39931

12/60
26

JOHN TERENDY,
Appellee,

vs.

PAULINA SWIERSKI et al.,
Appellants.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

296 I.A. 635

MR. PRESIDING JUSTICE O'CONNOR
DELIVERED THE OPINION OF THE COURT.

By this appeal Anna Swierski, Alex Swierski and Andrew P. Swierski, intervening petitioners in the trial court, seek to reverse an order entered by the Circuit court of Cook county denying their motion to have declared null and void a judgment entered by confession against Paulina Swierski, their mother.

The record discloses that on October 23, 1936, John Terendy filed a creditor's bill in the Circuit court of Cook county against Paulina Swierski, Elias Swierski and the Prudential Insurance Company of America, based on the judgment for $2285.67 entered by confession by the Circuit court April 10, 1930, in plaintiff's favor and against Paulina Swierski. The judgment was based on a judgment note dated January 21, 1928, for $2000, due six months after date, with interest at 6 per cent, payable to plaintiff's order and signed by Elias and Paulina Swierski. Elias Swierski died prior to the entry of this judgment. The creditor's bill was in the usual form; it alleged the issuance and return of an execution wholly unsatisfied and sought to reach the cash surrender value of three insurance policies issued by the Prudential Insurance Company to Paulina Swierski, in which Anna, Alex and Andrew P. Swierski were named as beneficiaries. January 10, 1937, after the filing of the creditor's bill but before service was had on defendant Paulina Swierski, she died, and on March 5, 1937, plaintiff filed an amended and supplemental creditor's bill in two counts, in which it was alleged that after the death of Paulina

29961.A. 635

JOHN TRAGNEY,
Appellee,

vs.

PAULINA SWIERSKI et al.,
Appellants.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. PRESIDING JUSTICE O'CONNOR
DELIVERED THE OPINION OF THE COURT.

By this appeal Anna Swierski, Alex Swierski and Andrew S. Swierski, intervening petitioners in the trial court, seek to reverse an order entered by the circuit court of Cook county denying their motion to have declared null and void a judgment entered by confession against Paulina Swierski, their mother.

The record discloses that on October 23, 1930, John Tragney filed a creditor's bill in the circuit court of Cook county against Paulina Swierski, Alias Swierski and the Prudential Insurance Company of America, based on the judgment for $2235.07 entered by confession by the Circuit court April 10, 1930, in plaintiff's favor and against Paulina Swierski. The judgment was based on a judgment note dated January 21, 1929, for $2000, due six months after date, with interest at 6 per cent, payable to plaintiff's order and signed by Alias and Paulina Swierski. Alias Swierski died prior to the entry of this judgment. The creditor's bill was in the usual form; it alleged the issuance and return of an execution wholly unsatisfied and sought to reach the cash surrender value of three insurance policies issued by the Prudential Insurance Company to Paulina Swierski, in which Anna, Alex and Andrew S. Swierski were named as beneficiaries. January 10, 1927, after the filing of the creditor's bill but before service was had on defendant Paulina Swierski, she died, and on March 5, 1927, plaintiff filed an amended and supplemental creditor's bill in two counts, in which it was alleged that after the death of Paulina

Swierski the Prudential Insurance Co. had in its possession the proceeds of three insurance policies aggregating $15,000. The first count of the amended and supplemental bill contained the usual allegations. And in the second count it was alleged that about December 1, 1935, one of the intervening petitioners, Andrew P. Swierski, was informed that plaintiff was about to commence supplemental proceedings against the Prudential Insurance Co. in an endeavor to satisfy the judgment entered by confession against Andrew's mother, Paulina; that Andrew requested plaintiff to refrain from this proceeding on the ground that his mother was dangerously ill and did not have long to live; and that in consideration of plaintiff agreeing to do so Andrew assumed and promised to pay the judgment at the rate of $15 a month, commencing December, 1935, and to continue such payments until the proceeds of the three life insurance policies on his mother's life were available, when the balance would be paid; that plaintiff agreed to this, and on December 18, 1935, Andrew paid $15 pursuant to agreement but refused after his mother's death to make any further payments.

April 21, 1937, Anna, Alex and Andrew filed their intervening petition, in which they set up that they were the surviving children of Paulina Swierski and the named beneficiaries in the three life insurance policies issued to Paulina by the Prudential Insurance Co.; that the $15,000, the proceeds of the three policies, were due and payable to the beneficiaries; that they were the only children of Paulina; that she died January 10, 1937, and thereupon the amounts due under the policies were payable to them; that they did what was necessary under the policies to be paid the $15,000 and demanded payment by the Insurance company, which was refused on the ground that suit had been brought against it by plaintiff in the filing of the creditor's bill, which was still pending, and therefore it could not pay the proceeds of the three policies to

Swierski the Prudential Insurance Co. had in its possession the proceeds of three insurance policies aggregating $15,000. The first count of the amended and supplemental bill contained the usual allegations. And in the second count it was alleged that about December 1, 1935, one of the intervening petitioners, Andrew P. Swierski, was informed that plaintiff was about to commence supplemental proceedings against the Prudential Insurance Co. in an endeavor to satisfy the judgment entered by confession against Andrew's mother, Paulina; that Andrew requested plaintiff to refrain from this proceeding on the ground that his mother was dangerously ill and did not have long to live; and that in consideration of plaintiff agreeing to do so Andrew assumed and promised to pay the judgment at the rate of $15 a month, commencing December, 1935, and to continue such payments until the proceeds of the three life insurance policies on his mother's life were available, when the balance would be paid; that plaintiff agreed to this, and on December 18, 1935, Andrew paid $15 pursuant to agreement but refused after his mother's death to make any further payments.

April 21, 1937, Anna, Alex and Andrew filed their intervening petition, in which they set up that they were the surviving children of Paulina Swierski and the named beneficiaries in the three life insurance policies issued to Paulina by the Prudential Insurance Co.; that the $15,000, the proceeds of the three policies, were due and payable to the beneficiaries; that they were the only children of Paulina; that she died January 10, 1937, and thereupon the amounts due under the policies were payable to them; that they did what was necessary under the policies to be paid the $15,000 and demanded payment by the insurance company, which was refused on the ground that suit had been brought against it by plaintiff in the filing of the creditor's bill, which was still pending, and therefore it could not pay the proceeds of the three policies to

the petitioners; that thereupon petitioners examined the files and records in the creditor's bill suit and discovered that the judgment against their mother had been entered April 10, 1930, and not April 12th, as alleged in the creditor's bill; that the record showed an execution had issued on the judgment and was served on their mother April 23, 1930, and returned, no part satisfied, by the sheriff; that upon examination of the record petitioners discovered that the judgment against their mother was entered by confession on a promissory note, setting up a copy of the note; that the warrant of attorney in the note was null and void in that the power to confess was joint and the judgment was against their mother alone; that their father, Elias Swierski, one of the joint makers of the note, died March 8, 1930, about 30 days before the judgment by confession was entered; that plaintiff was not entitled to any of the proceeds of the insurance policies because the proceeds belonged to petitioners, the beneficiaries, and one of the prayers of the petition was that the judgment entered against their mother be held null and void.

May 28th plaintiff Terendy filed his answer to the petition in which he set up, inter alia, that the judgment is "valid and subsisting and a lien upon the assets and property of the judgment debtor"; and that it could not be collaterally attacked; that he used due diligence to serve the judgment debtor, Paulina Swierski, before she died but was unable to do so.

June 4, 1937, petitioners filed their answer to the amended and supplemental bill. To the first count they set up that they were entitled to the insurance money, setting forth the facts; and it was alleged that Andrew P. Swierski denied he was informed plaintiff was about to commence proceedings against the Insurance company and take steps to levy upon the property belonging to Paulina Swierski, his mother; denied that he requested plaintiff to refrain

the petitioners; that thereupon petitioners examined the file and records in the creditor's bill suit and discovered that the judgment against their mother had been entered April 10, 1930, and not April 11th, as alleged in the creditor's bill; that the record showed an execution had issued on the judgment and was served on their mother April 23, 1930, and returned, no part satisfied, by the sheriff; that upon examination of the record petitioners discovered that the judgment against their mother was entered by confession on a promissory note, setting up a copy of the note; that the warrant of attorney in the note was null and void in that the power to confess was joint and the judgment was against their mother alone; that their father, Elias Swierski, one of the joint makers of the note, died March 8, 1930, about 30 days before the judgment by confession was entered; that plaintiff was not entitled to any of the proceeds of the insurance policies because the proceeds belonged to petitioners, the beneficiaries, and one of the prayers of the petition was that the judgment entered against their mother be held null and void.

May 27th plaintiff Teresdy filed his answer to the petition in which he set up, inter alia, that the judgment is "valid and subsisting and a lien upon the assets and property of the judgment debtor"; and that it could not be collaterally attacked; that he used due diligence to serve the judgment debtor, Paulina Swierski, before she died but was unable to do so.

June 4, 1937, petitioners filed their answer to the amended and supplemental bill. To the first count they set up that they were entitled to the insurance money, setting forth the facts; and it was alleged that Andrew D. Swierski denied he was informed plaintiff was about to commence proceedings against the insurance company and take steps to levy upon the property belonging to Paulina Swierski, his mother; denied that he requested plaintiff to retain

from bringing such proceeding; denied that he told plaintiff she was desperately ill; denied that he assumed and promised to pay the judgment entered against his mother at the rate of $15 a month or in any other manner, but averred that he called at the office of plaintiff's attorney, "acting as the agent and emissary of Paulina Swierski, made a payment of $15 and stated to the attorney for plaintiff that his mother would endeavor to pay $15 from time to time as the money was available"; that subsequent to such payment his mother was advised that the judgment against her was void, and because of this she gave Andrew no more money with which to make additional payments; that if any promise of payment was made by him it was void as being within the statute of frauds; that any forbearance on the part of plaintiff in filing his amended and supplemental bill was at plaintiff's own volition, and denies that plaintiff has any lien upon the proceeds of the insurance policies.

June 15th the court entered an order which recites that on motion of solicitors for the intervening petitioners a hearing be had on the intervening petition as to the validity of the judgment, and on October 13, 1937, an order was entered which recites that the cause came on to be heard on the Contested Motion Calendar, on motion of attorneys for petitioners to have declared null and void the judgment entered by confession against the petitioners' mother. The court heard arguments of counsel and found that all interested parties were represented and that the judgment was a valid and subsisting judgment and not subject to collateral attack by petitioners; and it was further ordered that petitioners' motion to declare the judgment void be and the same was denied. It is from this order that the petitioners prosecute this appeal.

Petitioners contend that the warrant to confess judgment on the note executed by their father and mother was joint and not

from bringing such proceeding; denied that he told plaintiff and was desperately ill; denied that he evaded and trifled to pay the judgment entered against his mother at the rate of $15 a month or in any other manner, but averred that he called at the office of plaintiff's attorney, "acting as the agent and attorney of Katrina Swieral, made a payment of $15 and stated to the attorney for plaintiff that his mother would endeavor to pay $15 from time to time as the money was available"; that subsequent to such payment his mother was advised that the judgment against her was void, and because of this she gave andrew no more money with which to make additional payments; that if any promise or payment was made by him it was void as being within the statute of frauds; that any forbearance on the part of plaintiff in filing his amended and supplemental bill was at plaintiff's own volition, and denies that plaintiff has any lien upon the proceeds of the insurance policies.

June 1920 the court entered an order which recites that on motion of solicitors for the intervening petitioners a hearing be had on the intervening petition as to the validity of the judgment, and on October 12, 1927, an order was entered which recites that the cause came on to be heard on the contested motion Clement, on motion of attorneys for petitioners to have declared null and void the judgment entered by confession against the petitioners' mother. The court heard arguments of counsel and found that all interested parties were represented and that the judgment was a valid and subsisting judgment and not subject to collateral attack by petitioners; and it was further ordered that petitioners' motion to declare the judgment void be and the same was denied. It is from this order that the petitioners prosecute this appeal.

Petitioners contend that the warrant to confess judgment on the note executed by their father and mother was joint and not

several, and that since their father died before the judgment was entered the judgment was void because the warrant to confess judgment was terminated by the death of the father. In the instant case, if the warrant to confess was joint the contention of the petitioners must be sustained. Genden v. Bailen, 275 Ill. App. 382; Merrion v. O'Donnell, 279 Ill. App. 435. The warrant of attorney in the note is as follows: "And to secure the payment of said amount we and each of us *** authorize *** any attorney *** to appear for us *** and confess a Judgment without process, in favor of the holder of this Note, *** and to waive and release all errors *** hereby ratifying and confirming all that our said attorney may do."

Without deciding whether the warrant to confess judgment was joint or joint and several, we hold that even if it be considered that the warrant was joint, this could not authorize us in disturbing the order of court holding that the judgment was valid because the proceeding before us is in chancery - a creditor's bill - and no defense to the merits was interposed by the petitioners nor by anyone else. And such a defense must be made before the judgment can be disturbed. Genden v. Bailen, 275 Ill. App. 382. In that case we said (p. 385): "We are also inclined to hold that an application to the court to vacate a judgment void upon the record is not an application to the equitable powers of the court in the sense that such words are used in a proceeding in equity. In a chancery proceeding the parties must show a willingness to do equity; but in a proceeding in a suit at law where, as we have said, a judgment is void as shown by the record, it is not necessary for the mover to do more than call attention of the trial court to the lack of jurisdiction to enter the judgment." Furthermore, we are of opinion that the order appealed from ought not to be disturbed because it appears in the answer filed by the petitioners to the

several, and that since their failure did before the judgment was entered the judgment was void because the warrant to confess judgment was terminated by the death of the debtor. In the instant case, if the warrant to confess was joint the confession of the petitioners must be sustained. Gaudem v. Sallen, 279 Ill. App. 382; Harrison v. O'Donnell, 279 Ill. App. 405. The warrant of attorney in the note is as follows: "And to secure the payment of said account we and each of us ** authorize ** any attorney ** to appear for us ** and confess a judgment without process, in favor of the holder of this note, ** and to waive and release all errors ** hereby ratifying and confirming all that our said attorney may do."

Without deciding whether the warrant to confess judgment was joint or joint and several, we hold that even if it be considered that the warrant was joint, this court may not authorize us in disturbing the order of court holding that the judgment was valid because the proceeding before us is in chancery - a creditor's bill - and no defense to the merits was interposed by the petitioners nor by anyone else. And such a defense must be made before the judgment can be disturbed. Gaudem v. Sallen, 279 Ill. App. 382. In that case we said (p. 385): "We are also informed to hold that an application to the court to vacate a judgment valid upon the record is not an application to the equitable powers of the court in the sense that such words are used in a proceeding in equity. In a chancery proceeding the parties must show a willingness to do equity; but in a proceeding in a suit at law where, as we have said, a judgment is void as shown by the record, it is not necessary for the party to do more than call attention of the trial court to the lack of jurisdiction to enter the judgment." Furthermore, we are of opinion that the order appealed from ought not to be disturbed because it appears in the answer filed by the petitioners to the

amended and supplemental bill that some time after the judgment by confession was entered, one of the petitioners, "acting as the agent and emissary of Paulina Swierski, made a payment of $15" on the judgment. In these circumstances we think petitioners ought not now be permitted to say that the judgment was void.

We are unable to agree with the contention made by counsel for the petitioners, namely, that the second count of the amended and supplemental bill and the petitioners' answer thereto cannot be considered on this appeal. All of the pleadings are to be taken into consideration.

Whether plaintiff is entitled to any claim against the proceeds of the three insurance policies is obviously in no way involved in the record before us.

The order of the Circuit court of Cook county appealed from is affirmed.

ORDER AFFIRMED.

McSurely and Matchett, JJ., concur.

amended and supplemental bill that was filed after the judgment by confession was entered, one of the petitioners, "acting as the agent and attorney of Pearlie Swiersk, made a payment of $15" on the judgment. In these circumstances we think petitioners ought not now be permitted to say that the judgment was void.

We are unable to agree with the contention made by counsel for the petitioners, namely, that the second count of the amended and supplemental bill and the petitioners' answer thereto cannot be considered on this appeal. All of the pleadings are to be taken into consideration.

Whether plaintiff is entitled to any claim against the proceeds of the three insurance policies is obviously in no way involved in the record before us.

The order of the circuit court of Cook county appealed from is affirmed.

ORDER AFFIRMED.

Gaurely and Matchett, JJ., concur.

40003

WILMA E. KINNEY,
Appellee,

vs.

PHILIP C. LINDGREN et al.,
Appellants.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

296 I.A. 635

MR. PRESIDING JUSTICE O'CONNOR
DELIVERED THE OPINION OF THE COURT.

January 24, 1935, plaintiff filed her complaint in chancery against Fred P. Heitman and Philip C. Lindgren, claiming that she was the beneficiary named in a trust agreement entered into January 13, 1922, between her mother, Anna C. Kinney, and Heitman and Lindgren; that prior to the execution of the trust agreement plaintiff's mother had purchased from the Heitman Bond & Mortgage Co. certain real estate mortgage bonds of which the Bond & Mortgage Co. was the house of issue; that at the time of the execution of the trust agreement plaintiff's mother turned over to the two trustees certain of these mortgage bonds; that from time to time the moneys invested in these bonds were reinvested by the trustees and that such investments continued for many years until March, 1932, when one of the last bonds in question was purchased; that plaintiff's mother died July 2, 1924. Plaintiff became 21 years of age November 23, 1935.

It was alleged in the bill that the investment of the trust funds in bonds by the two trustees was "in total disregard of their duties and in flagrant violation of the trust; the trustees well knowing that the bonds so purchased from the Heitman Trust Company, a corporation in which they were the principal officers, were worth considerably less at the time of purchase than the face value, the said trustees having charged the estate the full face value of the bonds plus interest to the date of purchase; and that

40003

ELLEN K. ELLERT,
Appellee,

vs.

PHILIP C. LINDGREN et al.,
Appellants.

Appeal from Superior Court
of Cook County.

29 I.A. 635

Mr. Presiding Justice O'Connor
DELIVERED THE OPINION OF THE COURT.

January 24, 1936, plaintiff filed her complaint in chancery against Fred P. Leitman and Philip C. Lindgren, claiming that she was the beneficiary named in a trust agreement entered into January 13, 1922, between her mother, Anna C. Hinney, and Leitman and Lindgren; that prior to the execution of the trust agreement plaintiff's mother had purchased from the Leitman Bond & Mortgage Co. certain real estate mortgage bonds of which the Bond & Mortgage Co. was the house of issue; that at the time of the execution of the trust agreement plaintiff's mother turned over to the two trustees certain of these mortgage bonds; that from time to time the money invested in these bonds were reinvested by the trustees and that such investments continued for many years until March, 1932, when one of the last bonds in question was purchased; that plaintiff's mother died July 2, 1924. Plaintiff became 21 years of age November 25, 1933.

It was alleged in the bill that the investment of the trust funds in bonds by the two trustees was "in total disregard of their duties and in flagrant violation of the trust; the trustees well knowing that the bonds so purchased from the Leitman Trust Company, a corporation in which they were the principal officers, were worth considerably less at the time of purchase than the face value, the said trustees having charged the entire the full face value of the bonds plus interest to the date of purchase; and that

as a result of their gross and wilful disregard of the safety of the investment of the trust fund, the trust estate had dwindled down to a small fraction of its original value." The prayer was for an accounting, and inasmuch as plaintiff would not be 21 years old until November 23, 1935, that a successor trustee be appointed and that defendants be decreed to pay to such successor trustee whatever should appear to be due, plaintiff being ready and willing to pay defendants what, if anything, should appear to be due upon the accounting.

In the bill the specific bonds which it was alleged defendant trustees held were described; they aggregated $11,300. The trust agreement was attached to the bill as an exhibit. Some of its provisions are: "Second: Said trustees shall have and hold, control and manage said trust property with full power to exchange, sell, convert and re-convert, invest and re-invest the same or any part or parts thereof, at any time or times *** as may appear convenient or expedient," and after paying all expenses trustees "shall pay over the entire net income to the settlor in monthly installments, *** during the natural life of the settlor.

"Third: And upon the death of the settlor, this trust shall continue until my daughter, Wilma E. Kinney, shall arrive at the age of twenty-one years. After my death, my said Trustees shall have the same rights with reference to the Trust estate as they are given during my lifetime and such rights shall continue until my daughter shall have arrived at the age of twenty-one years.

"After my death and until my said daughter shall have arrived at the age of twenty-one years, the net income from my said trust estate shall be paid over to my said daughter, Wilma E. Kinney, in monthly installments until she shall have arrived at the age of twenty-one years, and upon her arriving at the age of twenty-one years, all of my trust estate shall, by my Trustees, be delivered

as a result of their gross and willful disregard of the safety of the investment of the trust fund, the trust estate had dwindled down to a small fraction of its original value." The prayer was for an accounting, and inasmuch as plaintiff would not be 21 years old until November 23, 1950, that a successor trustee be appointed and that defendants be decreed to pay to such successor trustee whatever should appear to be due, plaintiff being ready and willing to pay defendants that, if anything, should appear to be due upon the accounting.

In the fifth the specific bonds which it was alleged defendant trustees had were described; they aggregated $13,300. The trust agreement was attached to the bill as an exhibit. Some of its provisions are: "Second: Said trustees shall have sole, control and manage said trust property with full power to exchange, sell, convert and re-convert, invest and re-invest the same or any part or parts thereof, at any time or times *** as they street convenient or expedient," and after paying all expenses trustees "shall pay over the entire net income to the settlor in monthly instalments, *** during the natural life of the settlor.

"Third: And upon the death of the settlor, this trust shall continue until my daughter, Ellen K. Kinney, shall arrive at the age of twenty-one years. After my death, my said trustees shall have the same rights with reference to the trust estate as they are given during my lifetime and such rights shall continue until my daughter shall have arrived at the age of twenty-one years.

"After my death and until my said daughter shall have arrived at the age of twenty-one years, the net income from my said trust estate shall be paid over to my said daughter, Ellen K. Kinney, in monthly instalments until she shall have arrived at the age of twenty-one years, and upon her arriving at the age of twenty-one years, all of my trust estate shall, by my trustees, be delivered

to her."

Defendants, on May 14, 1936, answered admitting having in their possession the real estate bonds aggregating $11,300, and tendering them. They set up the trust agreement and particularly two paragraphs which we have just quoted. They denied that they sold certain of the mortgage bonds, as alleged in the complaint, and averred that the bonds were paid in full, the proceeds credited to the trust estate and were afterward used to purchase additional securities - mortgage bonds; denied the allegation of the complaint that they disregarded their duties and violated their trust by purchasing bonds which were worth considerably less than the face value, charging plaintiff with the face value thereof.

July 10, 1935, the cause was referred to a master in chancery and the hearing began November 1, 1935. May 4, 1936, plaintiff, by leave of court, amended her complaint by changing the prayer by repudiating the purchase of the bonds described in her complaint, demanded an accounting, and that defendants be required to pay over all moneys invested by them in purchasing the bonds from the Heitman Trust Co.

Defendants filed an answer to the amendment denying the right of plaintiff to repudiate the purchase of the bonds; averring that subsequent to the death of plaintiff's mother plaintiff had ratified the purchase of some of the bonds after she became 18 years of age, viz., November 23, 1932. About two years afterward, November 4, 1936, an order was entered giving plaintiff leave to file a second amendment to her complaint instanter, which she accordingly did by making the Heitman Trust company, a corporation of which the two trustees were alleged to be the principal officers, defendant. December 10 the Trust Co. filed its answer, in which it was averred that it acted in good faith in selling the bonds to

to her."

Defendants, on May 14, 1934, answered admitting having in their possession the real estate bonds aggregating $11,500, and tendering them. They set up the trust agreement and particularly two paragraphs which we have just quoted. They denied that they said certain of the mortgage bonds, as alleged in the complaint, and averred that the bonds were paid in full, the proceeds credited to the trust estate and were altogether used to purchase additional securities - mortgage bonds; denied the allegation of the complaint that they diverted their duties and violated their trust by purchasing bonds which were worth considerably less than the face value, charging plaintiff with the face value thereof.

July 10, 1935, the cause was referred to a master in chancery and the hearing began November 1, 1935. May 4, 1936, plaintiff, by leave of court, amended her complaint by charging the trustee by repudiating the purchase of the bonds described in her complaint, demanded an accounting, and that defendants be required to pay over all moneys invested by them in purchasing the bonds from the Lutkem Trust Co.

Defendants filed an answer to the amended complaint, the right of plaintiff to repudiate the purchase of the bonds; averring that subsequent to the death of plaintiff's mother plaintiff had ratified the purchase of some of the bonds after she became 18 years of age, viz., November 25, 1932. Admitting the allegations, November 4, 1936, the master was ordered during December to file a second amendment to his complaint herein, which he accordingly did by making the Lutkem Trust Company, a corporation of which the two trustees were alleged to be the principal officers, defendant. Defendant LU the Trust Co. filed its answer, in which it was averred that it acted in good faith in selling the bonds to

the trustees and denied the allegation of the complaint that the bonds were of little or no value when sold for face value.

February 1, 1937, the master made up his report, in which he found that the trustees and the Heitman Trust Co. were liable for the face of the bonds - $11,300 - with interest thereon, less $716.25 for trustees' services, or a net of $12,865.13.

April 12, 1937, an order was entered suggesting the death of Fred P. Heitman, one of the trustees, finding that notice had been served on Ella G. Heitman, executrix of his estate, and that the suit proceed against the executrix. Objections were filed to the master's report by the trustees and the Trust Co., and after the death of Fred P. Heitman was suggested and his executrix substituted, additional objections were filed by them, one of which was that no summons was ordered to issue against the executrix. The objections were overruled but the date on which this was done does not appear. June 16, 1937, summons was issued against the executrix, she was served and entered her appearance and August 16, 1937, filed her answer, in which she "in abatement" denies that she is jointly liable with Lindgren and the Trust Co. Apparently no attention was paid to the answer, and November 12 a decree was entered in accordance with the recommendations of the master, all exceptions being overruled. And it was decreed that plaintiff recover $12,284.13 from Lindgren, "the Administratrix" (executrix) and the Heitman Trust Co., and that unless the amount was paid within 5 days an execution issue against each of the three parties; they prosecute this appeal.

On the hearing defendants tendered the $11,300 bonds but the tender was refused.

Counsel for defendants point out that plaintiff offered no evidence to sustain the allegation of her complaint, viz., that

the trustees and denied the allegation of the complaint that the bonds were of little or no value when sold for face value.

February 1, 1937, the master made up his report, in which he found that the trustees and the Guitman Trust Co. were liable for the face of the bonds - $11,500 - with interest thereon, less $715.80 for trustees' services, or a net of $14,885.11.

April 12, 1937, an order was entered suggesting the death of Fred P. Guitman, one of the trustees, finding that notice had been served on Ella S. Gelt as, executrix of his estate, and that the suit proceed against the executrix. Objections were filed to the master's report by the trustees and the Trust Co., and after the death of Fred P. Guitman was suggested and his executrix substituted, additional objections were filed by them, one of which was that no summons was ordered to issue against the executrix. The objections were overruled but the date on which this was done does not appear. June 18, 1937, summons was issued against the executrix, she was served and entered her appearance and August 16, 1937, filed her answer, in which she "in abundance" denies that she is jointly liable with Guitman and the Trust Co. Apparently no attention was paid to the answer, and November 12 a decree was entered in accordance with the recommendations of the master, all exceptions being overruled. And it was decreed that plaintiff recover $12,384.11 from Guitman, "the administratrix" (executrix) and the Guitman Trust Co., and that unless the money was paid within 5 days an execution issue against each of the three parties; they prosecute this appeal.

On the hearing defendants tendered the $11,500 bonds but the tender was refused.

Counsel for defendants point out that plaintiff offered no evidence to sustain the allegation of her complaint, viz., that

the trustees acted "in total disregard of their duties and in flagrant violation of the trust"; that the bonds "were worth considerably less at the time of purchase than the face value," but that the trustees charged the trust estate the full face value. The record sustains the statement of counsel. At no time did plaintiff offer any evidence or suggest that the bonds were not worth their face value when purchased. This allegation of the complaint was wholly abandoned by plaintiff, although it was not eliminated from her pleading.

On the hearing and in this court plaintiff seems to rely solely on her contention that since the two trustees were the principal officers of the Heitman Trust Co., the purchase of the bonds by the trustees from the Trust company was illegal, and that since she did not ratify such purchases she was free to repudiate them and recover the face value of the bonds, which amount had been charged against the trust estate, and this seems to have been the view of the master and of the chancellor.

On the other side, counsel for defendants say, "We do not concede for a moment that the purchases of securities by the trustees was voidable. We contend that in view of the course of dealing established at the direction of the settlor the trustees were fully authorized and justified in making the purchases they did." Counsel further say that plaintiff, after reaching her majority in 1932, by accepting interest payments for a period of over two years, with full knowledge of the fact that the trustees had purchased the bonds from the Heitman Trust Co., ratified such purchases.

The evidence shows that on March 25, 1933, plaintiff, with her aunt, Elizabeth C. Kilbert (who was guardian of her estate while it was pending in the Probate court of Cook county, but which had then been terminated and the property of that estate turned over to plaintiff) went to the office of the Heitman Trust Co.,

the trustees acted "in total disregard of their duties and in flagrant violation of the trust"; that the bonds "were worth considerably less at the time of purchase than the face value," but that the trustees charged the trust estate the full face value. The record showing the statement of counsel. At no time did plaintiff offer any evidence or suggest that the bonds were not worth their face value when purchased. This allegation of the complaint was wholly abandoned by plaintiff, although it was not eliminated from her pleading.

On the hearing and in this court plaintiff seems to rely solely on her contention that since the two trustees were the principal officers of the Reliance Trust Co., the purchase of the bonds by the trustees from the trust company was illegal, and that since she did not really show purchases she was free to repudiate them and recover the face value of the bonds, which amount had been charged against the trust estate, and this seems to have been the view of the master and of the chancellor.

On the other side, counsel for defendants say, "We do not concede for a moment that the purchase of securities by the trustees was voidable. We contend that in view of the course of dealing established at the direction of the settlor the trustees were fully authorized and justified in making the purchases they did." Counsel further say that plaintiff, after reaching her majority in 1924, by accepting interest payments for a period of over two years, with full knowledge of the fact that the trustees had purchased the bonds from the Reliance Trust Co., waived such purchases.

The evidence shows that on March 23, 1923, plaintiff, with her aunt, Elizabeth D. Elliott (who was guardian of her estate while it was pending in the Prince George court of Good Conduct, but which had then been translated and the property of real estate turned over to plaintiff) went to the office of the Reliance Trust Co.,

of which Mrs. Kilbert was also a customer, and there executed a power of attorney giving her aunt full authority to act for her, and at the same time she and her aunt signed 7 separate letters or documents addressed to the Heitman Trust Co., agreeing to "forbear in the payment of our 'Argyle Block' Bond #23, for $500, Due May 21st, 1932 until November 21st, 1935." The other 6 letters or documents are similar to the one just quoted from, except each one is for a different bond and the time of extension of payment , etc., is somewhat different. At the time of the execution of the power of attorney by plaintiff, it appears she was about to leave for Ann Arbor to study law. At this time her aunt, as attorney in fact, receipted for and endorsed a check for moneys received from some bonds; that plaintiff herself on April 12, 1933, accepted interest from defendants from the trust property and endorsed a check for the money, and again on February 1, 1934, she receipted for and endorsed a check for moneys paid to her from the trust estate. There is other evidence in the record which, defendants contend, shows ratification, but we think it unnecessary to refer to it here.

Counsel for defendants also contend that the master and the chancellor erred in excluding evidence offered by them to the effect that prior to and at the time of the execution of the trust indenture by Mrs. Kinney, Mrs. Kinney said she wanted the Heitman Bond & Mortgage Co. to be the trustee because she wanted the trust investments to be of a type that Company was dealing in at the time; but she was then told that the Heitman Bond & Mortgage Co. was not authorized to accept trusts, but she could receive the same service by appointing that company's two officers, Heitman and Lindgren. This offered evidence was excluded on the ground that it tended to vary the terms of the trust agreement. While at first blush it might seem that the ruling was correct in that the offered testimony tended to violate the parol evidence rule, counsel for defendants' position

of which are. Hilbert was also a creditor, and there executed a power of attorney giving her such full authority to act for her, and at the same time she and her husband signed 7 separate letters or documents addressed to the Heilman Trust Co., referring to "Pioneer in the payment of our 'Apple Blossom' bond #23, for \$500, due May 21st, 1932 until November 21st, 1935." The other 6 letters or documents are similar to the one just quoted from, except each one is for a different bond and the time of extension of payment, is somewhat different. At the time of the execution of the power of attorney by plaintiff, it appears she was about to leave for Ann Arbor to study law. At this time her husband, as attorney in fact, received for and endorsed a check for moneys received from some bonds; that plaintiff herself on April 12, 1932, accepted interest from defendants from the trust property and endorsed a check for the money, and again on February 1, 1934, she receipted for and endorsed a check for moneys paid to her from the trust estate. There is other evidence in the record which, for brevity omitted, does not, in the final it unnecessary to refer to it here.

Counsel for defendants also contend that the master and the chancellor erred in excluding evidence offered by them to the effect that prior to and at the time of the execution of the trust instrument by Mrs. Hilbert, Mrs. Kinney said she wanted the Heilman Bond & Mortgage Co. to be the trustee because she wanted the trust investments to be of a type that company was dealing in at the time; but she was then told that the Heilman Bond & Mortgage Co. was not authorized to accept trusts, but she could receive the same service by appointing that company's two officers, Heilman and Hindman. This offered evidence was excluded on the ground that it tended to vary the terms of the trust agreement. While at first blush it might seem that the ruling was correct, in that the offered testimony tended to violate the parol evidence rule, counsel for defendants' position

seems to be that the evidence was admissible as tending to show the course of dealing both prior to and after the execution of the trust agreement. They say that shortly after the execution of the trust agreement the trustees purchased securities of a similar character from the Heitman Bond & Mortgage Co., which Mrs. Kinney approved and ratified. But in the view we take of the case it is unnecessary to pass on whether this evidence was properly excluded, as we are of opinion that all the evidence shows that the settlor, Mrs. Kinney, knew all of the mortgage bonds were being purchased from the Heitman Trust Co., and that she wanted this continued until her daughter became 21 years of age. The master finds that at the time of the execution of the trust agreement the Heitman Bond & Mortgage Co. was not authorized to accept trusts under the laws of Illinois; that subsequently, on November 10, 1926, it was so qualified and changed its name to the Heitman Trust Co.; that Heitman and Lindgren were the principal officers of the old as well as of the new company; that the company "was for many years engaged in the business of financing real estate bonds and note issues, selling such securities to the investing public; that said Anna C. Kinney, as Trustor in said trust agreement, had been one of the customers of said company and from time to time had purchased securities from said company"; that after the execution of the trust agreement Mrs. Kinney delivered to the trustees the securities which she had theretofore purchased from the Heitman Bond & Mortgage Co.; that June 6, 1923, about a year and a half after the trust agreement was made, Mrs. Kinney purchased from the Heitman Bond & Mortgage Co. two other real estate bonds of $15,000 each.

The second paragraph of the trust agreement authorizes the trustees to control and manage the trust property, "to exchange, sell, convert and re-convert, invest and re-invest" any of the trust property as might be considered by the trustees convenient or expedient, and by the third paragraph of the agreement Mrs. Kinney

seems to be that the evidence was admissible as tending to show the course of dealing both prior to and after the execution of the trust agreement. They say that mostly after the execution of the trust agreement the trustees purchased securities of a similar character from the Kathan Land & Mortgage Co., which were, thereby approved and ratified. But in the view we take of the case it is unnecessary to pass on whether this evidence was properly excluded, as we are of opinion that all the evidence shows that the settlor, Mrs. Kinney, knew all of the mortgage bonds were being purchased from the Kathan Trust Co., and that she wanted this investment until her death; it became 30 years of age. The master finds that at the time of the execution of the trust agreement the Kathan Land & Mortgage Co. was not authorized to accept trusts under the laws of Illinois; that subsequently, on November 10, 1924, it was so qualified and changed its name to the Kathan Trust Co.; that Kathan and Lindgren were the principal officers of the old as well as of the new company; that the company "was for many years engaged in the business of financing real estate bonds and note issues, selling such securities to the investing public; that said John C. Kinney, as Trustor in said trust agreement, had been one of the customers of said company and from time to time had purchased securities from said company"; that after the execution of the trust agreement Mrs. Kinney delivered to the trustees the securities which she had therefore purchased from the Kathan Land & Mortgage Co.; that June 3, 1923, about a year and a half after the trust agreement was made, Mrs. Kinney purchased from the Kathan Land & Mortgage Co. two other real estate bonds of $15,000 each.

The second paragraph of the trust agreement authorizes the trustees to control and manage the trust property, "to mortgage, sell, convert and re-convert, invest and re-invest" any of the trust property as might be considered by the trustees convenient or expedient, and by the third paragraph of the agreement Mrs. Kinney

expressly provided that the trust agreement should continue until her daughter was 21 years of age, and that "After my death my said Trustees shall have the same rights with reference to the Trust estate as they are given during my lifetime and such rights shall continue until my daughter shall have arrived at the age of twenty-one years."

There is no evidence, nor even a suggestion, that the trustees did not follow the instructions given them in the trust agreement. Plaintiff's mother, the settlor, died in 1924, about two and a half years after the trust agreement was executed. The instant suit was brought January 24, 1935, in which plaintiff charged the trustees had violated their duties by purchasing bonds of little or no value, paying the full face value for them. This charge, while not eliminated from the pleading, was wholly abandoned on the hearing and it was not until May 4, 1936, nearly 12 years after her mother died and about four years after plaintiff attained her majority, that she first sought to repudiate the purchase of the bonds. There is no evidence or suggestion that the bonds were not worth face value when purchased, and the fact that at the time of filing the suit they were of little or no value does not tend to show that defendants acted in bad faith in purchasing the bonds. Courts take judicial notice that there was a great depression in the value of real estate bonds during the early 1930's, and from which there has not been complete recovery. Straus v. Chicago Title & Trust Co., 273 Ill. App. 63; Atchison, T. & S. F. Ry. Co. v. United States, 284 U. S. 248; Morris Plan Bank of Richmond v. Henderson, 57 F. (2d) 326.

The decree of the Superior Court of Cook County is reversed and the cause remanded.

REVERSED AND REMANDED.

McSurely and Matchett, JJ., concur.

expressly provided that the trust agreement should continue until her daughter was 21 years of age, and that "After my death, my said Trustees shall have the same rights with reference to the Trust estate as they are given during my lifetime and such rights shall continue until my daughter shall have arrived at the age of twenty-one years."

There is no evidence, nor even a suggestion, that the trustees did not follow the instructions given them in the trust agreement. Plaintiff's mother, the settlor, died in 1924, about two and a half years after the trust agreement was executed. The instant suit was brought January 24, 1938, in which plaintiff charged the trustees had violated their duties by purchasing bonds of little or no value, paying the full face value for them. It is certain, while not eliminated from the pleading, was wholly abandoned on the hearing and it was not until May 4, 1936, nearly 12 years after her mother died and about four years after plaintiff attained her majority, that the first bonds to repudiate the purchase of the bonds. There is no evidence or suggestion that the bonds were not worth face value when purchased, and the fact that at the time of filing the suit they were of little or no value does not tend to show that defendants acted in bad faith in purchasing the bonds. Courts take judicial notice that there was a great depression in the value of real estate bonds during the early 1930's, and from which there has not been complete recovery. Ziegler v. Waldron Title & Trust Co., 273 Ill. App. 83; Atkinson, T. & C. R. R. v. United States, 244 U. S. 248; Morris Plan Ins. of Richmond v. Henderson, 57 F. (2d) 326.

The decree of the superior court of Cook county is reversed and the cause remanded.

REVERSED AND REMANDED.

McGurdy and Matchett, J.J., concur.

40015

CHRISTINE C. BROWN,
Appellee,

vs.

NEIL SATTERLEE,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

296 I.A. 635

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In an action upon a promissory note defendant pleaded payment. There was a trial by jury with a verdict for plaintiff in the sum of $1162.50, upon which the court, overruling defendant's motions for a new trial and for judgment non obstante veredicto, entered judgment, and defendant appeals.

Defendant contends that under the evidence his motion, made at the close of all the evidence for a directed verdict in his favor, should have been granted; that the verdict of the jury is against the manifest weight of the evidence, and that the court erred in permitting one of defendant's witnesses to be questioned on cross-examination about entries made in defendant's books of account without requiring the books to be produced.

Plaintiff upon the trial produced the note, which was admitted in evidence. It is dated October 1, 1926, by its terms is due two months after date, is for the sum of $750 with interest at the rate of 5% per annum, payable to the order of plaintiff. No payments have been endorsed on the note. Although by its terms the note fell due December 1, 1926, this suit was not begun until January 9, 1936. For about four years plaintiff has been a resident of California; she formerly resided at Riverside, Illinois. She testifies that she received this note on October 1, 1926, and that at that time she gave her check for $750 to her husband, Walter Brown; that the check, which she does not have, was to the order of defendant; that Mr. Brown took her check in the morning and in

CHRISTINE C. BROWN,
Appellee,

vs.

WILL SATTERLEE,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

In an action upon a promissory note defendant pleaded payment. There was a trial by jury with a verdict for plaintiff in the sum of $1152.50, upon which the court, overruling defendant's motions for a new trial and for judgment non obstante veredicto, entered judgment, and defendant appeals.

Defendant contends that under the evidence his motion, made at the close of all the evidence for a directed verdict in his favor, should have been granted; that the verdict of the jury is against the manifest weight of the evidence, and that the court erred in permitting one of defendant's witnesses to be questioned on cross-examination about entries made in defendant's books of account without requiring the books to be produced.

Plaintiff upon the trial produced the note, which was admitted in evidence. It is dated October 1, 1926, by its terms is due two months after date, is for the sum of $970 with interest at the rate of 5% per annum, payable to the order of plaintiff. No payments have been endorsed on the note. Although by its terms the note fell due December 1, 1926, this suit was not begun until January 9, 1934. For about four years plaintiff has been a resident of California; she formerly resided at Riverside, Illinois. She testifies that she received this note on October 1, 1926, and that at that time she gave her check for $700 to her husband, Walter Brown; that the check, which she does not have, was to the order of defendant; that Mr. Brown took her check in the morning and in

evening brought home this note and gave it to her. She did not at any time prior to bringing suit make a demand on defendant to pay the note. However, her attorney made such a demand a few days before the suit was filed.

The uncontradicted evidence shows that prior to 1930 the Brown and Satterlee families were very good friends. Brown was first a reporter and afterward manager of the City Press Association; in 1926 his office was 713 Ashland block and defendant's office at 1101 in the same building. The Brown and Saterlee families had summer homes at Algoma, Wisconsin; the families saw each other often; in 1930 some unpleasantness arose between Mrs. Brown and Mrs. Satterlee; there was a break in their friendly relationship; Mrs. Brown says the men of the two families did not continue to be good friends; she says, however, the two men saw each other frequently until Mr. Brown took ill, and twice during Mr. Brown's illness defendant visited him at the hospital. Mr. Brown died in California June 13, 1935. In a deposition taken before the trial plaintiff testified that she left any possibility of the collection of the note to her husband.

In support of his plea that the note had been paid, defendant and his office manager, Mr. Kuhlmann, testified. Defendant said that on July 12, 1927, Mr. Brown called him up; that he (defendant) went downstairs and asked "Brownie" what he wanted, and that Brown said, "I want you to pay that $750. You have let it drag along too long." Defendant says he went upstairs and told his manager, Kuhlmann, to draw a currency check for $1000; he says he took the check to Brown's office, handed it to him, and said, "You get that cashed." Defendant says Brown replied, "Well, I do not want a check; I want cash." "I said, 'All right; I will call up Clarence, my manager.'" Defendant testifies he called "Clarence," who promptly came down; that defendant told him Brown wanted cash, and that Clarence took the

evening brought home this note and gave it to her. She did not at any time prior to bringing suit make a demand or defendant to pay the note. However, her attorney made such a demand a few days before the suit was filed.

The uncontradicted evidence shows that prior to 1930 the Brown and Satterlee families were very good friends. Brown was first a reporter and afterward an agent of the City Press Association; in 1926 his office was 715 Ashland Block and defendant's office at 1101 in the same building. The Brown and Satterlee families had summer homes at Algoma, Wisconsin; the families saw each other often; in 1930 some unpleasantness arose between Mrs. Brown and Mrs. Satterlee; there was a break in their friendly relationship; Mrs. Brown says the men of the two families did not continue to be good friends; she says, however, the two men saw each other frequently until Mr. Brown took ill, and twice during Mr. Brown's illness defendant visited him at the hospital. Mr. Brown died in California June 17, 1932. In a deposition taken before the trial plaintiff testified that she left any possibility of the collection of the note to her husband.

In support of his plea that the note had been paid, defendant and his office manager, Mr. Ashlemen, testified. Defendant said that on July 12, 1927, Mr. Brown called him up; that he (defendant) went downstairs and asked "Brownie" what he wanted, and that Brown said, "I want you to pay that $750. You have let it drag along too long." Defendant says he went upstairs and told his manager, Ashlemen, to draw a currency check for $1000; he says he took the check to Brown's office, handed it to him, and said, "You get that cashed." Defendant says Brown replied, "Well, I do not want a check; I want cash." "I said, 'All right; I will call up Clarence, my manager.'" Defendant testifies he called "Clarence," who promptly came down; that defendant told him Brown wanted cash, and that Clarence took the

check and cashed it, brought the money back to him, and that he then and there paid Brown $750. Defendant says that in reply to a question from him, Brown said he did not want any interest. Defendant and Mr. Brown had a couple of drinks and went over to the Sherman house, where they had lunch. Neither Brown nor his wife, defendant says, ever afterward spoke to him about the payment of the note. Defendant says Brown at the time of the payment told him he did not have the note, that it was at his (Brown's) home, and that he would tear it up and forget about it. At that time defendant was working as a shorthand reporter for Brown's organization. They would lend each other $50 to $100 at a time; they had a joint account in the stock market which began with Babcock & Rushton and ended with Frazier Jelke. Defendant also had a personal account with Lamson Brothers. The joint account was closed out in 1928.

Defendant's check No. 12183 is in evidence. Defendant's name is printed in the lefthand corner of it; it is dated at Chicago, Illinois, July 12, 1927, and reads:

"Pay to the order of Currency-------$1000.00."

It is directed to the State Bank of Chicago and has a stamp on it indicating that it was paid by the bank July 12, 1927; on the back appears the endorsement, "C. F. Kuhlmann." This is the check (according to the testimony of defendant) with which the cash to pay Brown was obtained. Defendant says that as a matter of fact he never knew it was Mrs. Brown's note; that he did not look carefully at the note, saw it was for $750 and signed it, but paid no attention as to how it was written, what its terms were, or to whom it was payable; that the attorney for plaintiff made a demand on him for payment of the note prior to filing suit and talked with him in his office; defendant told him he never owed Christine Brown a cent but owed Walter Brown $750, which he had paid; he did not think he

check and cashed it, brought the money back to him, and that he then and there paid Brown $750. Defendant says that in reply to a question from him, Brown said he did not want any interest. Defendant and Mr. Brown had a couple of drinks and went over to the German house, where they had lunch. Without Brown or his wife, defendant says, ever mentioned about to him about the payment of the note. Defendant says Brown at the time of the payment told him he did not have the note, that it was at his (Brown's) home, and that he would tear it up and forget about it. At that time defendant was working as a workmen's reporter for Brown's organization. They would lend each other $50 to $100 at a time; they had a joint account in the stock market which began with Babcock & Hamilton and ended with Proctor Jaile. Defendant also had a personal account with Hanson Brothers. The joint account was closed out in 1929.

Defendant's check No. 1240 is in evidence. Defendant's name is printed in the lefthand corner of it; it is dated at Chicago, Illinois, July 12, 1927, and reads:

"Pay to the order of Currency--------$1000.00."

It is directed to the State Bank of Chicago and has a stamp on it indicating that it was paid by the bank July 12, 1927; on the back appears the endorsement, "C. F. Hammann." This is the check (according to the testimony of defendant) with which the check to pay Brown was obtained. Defendant says that as a matter of fact he never knew it was Mrs. Brown's note; that he did not look carefully at the note, saw it was for $750 and signed it, but paid no attention as to how it was written, what its terms were, or to whom it was payable; that the attorney for plaintiff made a demand on him for payment of the note prior to filing suit and talked with him in his office; defendant told him he never owed anything Brown a cent but owed Walter Brown $750, which he had paid; he did not think he

told the attorney how he paid it, but he says certainly he did not tell him he paid it in "dribs and drabs" or that the last payment was made in 1930; he denies that he told the attorney that Mr. Brown told him he had cleared up the matter about the note at home; he says that before and after the transaction in which this note was given there were occasions when he and Brown made personal loans to each other; if he wanted $50 he would go down and get it from "Brownie" and if Brown wanted $50 he would come up and get it from defendant. Further questions as to whether there were subsequent loans after the cashing of the $1000 check between defendant and Brown were objected to by plaintiff and the objection sustained.

Kuhlmann testified for defendant that he had worked for defendant as a shorthand reporter for 16 years, identified the $1000 check, said it was in his handwriting except the signature, which is in the handwriting of defendant; he knew Walter Brown ever since he worked for defendant; he said that at the time in question he received a call from defendant to come to Brown's office; he went there and defendant told him that Mr. Brown wanted currency for the note that was due him; said he would have to have currency for him; that defendant asked witness to go to the bank and get the check cashed, which he did; the State Bank of Chicago was at that time on the corner of Washington and LaSalle streets; that he cashed the check, brought the money back to Brown's private office and in his presence defendant gave the money to Brown; he says he saw defendant at that time give Brown some money - "peel off several hundred dollar bills;" he could not swear to the exact amount; he remembers something was mentioned about the note and Brown said he did not have it, that it was at home and he would destroy it. The witness had been down to Brown's office several times before, but did not recall that there were any other transactions where money passed

tell the attorney how he paid it, but he says certainly he did not tell him he paid it in "drips and drabs" or that the last payment was made in 1930; he denies that he told the attorney that Mr. Brown told him he had cleared up the matter about the note at home; he says that before and after the transaction in which this note was given there were occasions when he and Brown made personal loans to each other; if he wanted $50 he would go down and get it from "Brownie" and if Brown wanted $50 he would come up and get it from defendant. Further questions as to whether there were subsequent loans after the cashing of the $1000 check between defendant and Brown were objected to by plaintiff and the objection sustained.

Lehman testified for defendant that he had worked for defendant as a monthly reporter for 12 years, introduced the $1000 check, said it was in his handwriting except the signature, which is in the handwriting of defendant; he knew Walter Brown ever since he worked for defendant; he said that at the time in question he received a call from defendant to come to Brown's office; he went there and defendant told him that Mr. Brown wanted currency for the note that was due him; said he would have to have currency for him; that defendant asked witness to go to the bank and get the check cashed, which he did; the State Bank of Chicago was at that time on the corner of Washington and Dearborn streets; that he cashed the check, brought the money back to Brown's private office and in his presence defendant gave the money to Brown; he says he saw defendant at that time give Brown some money - "peel off several hundred dollar bills;" he could not swear to the exact amount; he remembers something was mentioned about the note and Brown said he did not have it, that it was at home and he would bring it. The witness had been down to Brown's office several times before, but did not recall that there were any other transactions where money passed

between Brown and defendant; this was the only instance; there was no money transaction between them at any other time when witness was present; he was an office manager or bookkeeper for defendant, but had no books showing any transactions between Brown and defendant; the $750 loan from Brown was for the business and it was on the books; there was no notation as to whether the loan was in the form of a note or not; the books, he said, were available but it would take 10 or 15 minutes to get them; the transaction was listed as cash received from Mr. Brown; there was no notation about Mrs. Brown; the entry was made from facts told to him by defendant; there were no notations or entries in the books relative to any other moneys lent defendant by Brown; he says defendant was in the habit of drawing checks to currency in payment of his accounts and bills; if he wanted cash he would get it in currency.

Plaintiff then testified that she did not receive $750 or any part thereof from Mr. Brown as payment from Mr. Satterlee; she had some talk with Mr. Brown about payment but she did not at any time direct Mr. Brown to collect this money; she left to Mr. Brown entirely the collection of this note but he never told her it was collected.

This is the material evidence as given on the trial.

In the first place it is apparent that this court can not hold as a matter of law that the note was in fact paid. Assuming the authority of Walter Brown to act for plaintiff and receive payment of the note, we hold there was an issue for the jury on the question of whether that payment was in fact made. Defendant cites a number of cases supporting the proposition that where the evidence tending to support an affirmative defense is unimpeached and uncontradicted, a motion to direct a verdict for the defendant should be granted. He cites Devine v. Modern Woodmen of America, 171 Ill. App. 592; Cohen v. New York Life Ins. Co., 256 Ill. App. 345, and similar

between Brown and defendant; this was the only instance; there was no money transaction between them at any other time when witness was present; he was an office manager or bookkeeper for defendant, but had no books showing any transactions between Brown and defendant; the $750 loan from Brown was for the business and it was on the books; there was no notation as to whether the loan was in the form of a note or not; the books, he said, were available but it would take 10 or 15 minutes to get them; the transaction was listed as cash received from Mr. Brown; there was no notation about Mrs. Brown; the entry was made from facts told to him by defendant; there were no notations or entries in the books relative to any other moneys lent defendant by Brown; he says defendant was in the habit of issuing checks to currency in payment of his accounts and bills; if he wanted cash he would get it in currency.

Plaintiff then testified that she did not receive $750 or any part thereof from Mr. Brown as payment from Mr. Wakefield; she had some talk with Mr. Brown about payment but she did not at any time direct Mr. Brown to collect this money; she left to Mr. Brown entirely the collection of this note but he never told her it was collected.

This is the material evidence as given on the trial.

In the first place it is apparent that this court can not hold as a matter of law that the note was in fact paid. Assuming the authority of Walter Brown to act for plaintiff and receive payment of the note, we hold there was an issue for the jury as to the question of whether that payment was in fact made. Defendant cites a number of cases supporting the proposition that where the evidence tending to support an affirmative defense is uncontroverted and undisputed, a motion to direct a verdict for the defendant should be granted. He cites Davies v. Modern Woodmen of America, 171 Ill. App. 592; Cohen v. New York Life Ins. Co., 266 Ill. App. 345, and similar

cases. In those cases the affirmative defense was proved by evidence which was unimpeached and uncontradicted. That is not the case here. Here the plaintiff has the note in her possession. She produced it in court uncanceled and without credits on it. This is very convincing evidence tending to show that the note has not been in fact paid. Defendant gave evidence tending to show the note was paid to plaintiff's husband July 12, 1927, but the facts in connection with that supposed payment, as narrated by defendant's witnesses, are unusual and improbable. Defendant was not unacquainted with business customs. He must have been aware of the inference which would necessarily be drawn by the fact that the note was left in possession of the owner. He says he asked about the note at the time he made the payment, but apparently never afterward made any inquiry as to where it was. Then the manner of payment was unusual in that defendant caused a check to be drawn for $1,000, and, according to his testimony, this in payment of the note for $750. There is no explanation of why he caused a check for $1000 to be drawn in payment of a note for $750 with accrued interest amounting to a few dollars. It is apparent the jury did not believe the testimony of defendant and his bookkeeper with reference to the payment of the note. It was for the jury to weigh the evidence, and it could reject evidence which it deemed inherently improbable. If the trial Judge believed the verdict of the jury was against the manifest weight of the evidence, it was his duty to set aside the verdict and grant a new trial. It is apparent that neither the trial Judge nor the jury was convinced by the evidence offered in defendant's behalf. On the other hand, the fact that plaintiff held the note for such a long time without demanding payment is a circumstance which might tend to justify the inference of payment. The Statute of Limitations, however, had not run when the suit was brought, and it does not appear that

cases. In those cases the affirmative defense was proven by evidence which was unimpeached and uncontradicted. Also is not the case here. Here the plaintiff has the note in her possession. She produced it in court unmutilated and without credits on it. This is very convincing evidence tending to show that the note has not been in fact paid. Defendant gave evidence tending to show the note was paid to plaintiff's husband July 14, 1917, but the facts in connection with that supposed payment, as narrated by defendant's witnesses, are unusual and improbable. Defendant was not unacquainted with business matters. He must have been aware of the inference which would necessarily be drawn by the fact that the note was left in possession of the owner. He might be asked about the note at any time he made the payment, but apparently never afterward made any inquiry as to where it was. Then the manner of payment was unusual in that defendant caused a check to be drawn for $1,000, and, according to his testimony, this in payment of the note for $750. There is no explanation or why he caused a check for $1000 to be drawn in payment of a note for $750 with accrued interest amounting to a few dollars. It is apparent the jury did not believe the testimony of defendant and his bookkeeper with reference to the payment of the note. It was for the jury to weigh the evidence, and it could reject evidence which it deemed inherently improbable. If the trial judge believed the verdict of the jury was against the manifest weight of the evidence, it was his duty to set aside the verdict and grant a new trial. It is apparent that neither the trial judge nor the jury was convinced by the evidence offered in defendant's behalf. On the other hand, the fact that plaintiff held the note for such a long time without demanding payment is a circumstance which might tend to justify the inference of payment. The statute of limitations, however, had not run when the suit was brought, and it does not appear that

inquiry was made of plaintiff as to the reasons why she had not pressed for payment. Upon a consideration of all the evidence we think the issue presented was one of fact for the jury. The jury found for plaintiff; the trial Judge has approved the verdict, and we cannot say that it is clearly and manifestly against the weight of the evidence.

Complaint is made that the attorney for plaintiff was permitted to cross-examine the bookkeeper concerning entries made in defendant's books without the production of the books. These books, however, were in defendant's possession, and it is fair to presume that if the evidence therein tended to establish the defense defendant would have produced them.

The judgment is affirmed.

AFFIRMED.

O'Connor, P. J., and McSurely, J., concur.

inquiry was made of plaintiff as to the reasons why she had not pressed for payment. Upon a consideration of all the evidence we think the issue presented was one of fact for the jury. The jury found for plaintiff; the trial judge has approved the verdict, and we cannot say that it is clearly and manifestly against the weight of the evidence.

Complaint is made that the attorney for plaintiff was permitted to cross-examine the bookkeeper concerning entries made in defendant's books without the production of the books. These books, however, were in defendant's possession, and it is fair to presume that if the evidence therein tended to establish the defense interposed would have produced them.

The judgment is affirmed.

AFFIRMED.

O'Connor, P. J., and Kozinsky, J., concur.

40031

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

LEO MILLER and GORDON GARBELL,
Plaintiffs in Error.

ERROR TO CRIMINAL COURT OF COOK COUNTY.

296 I.A. 636

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Defendants, Garbell and Miller, upon trial by jury on an indictment charging a conspiracy to obstruct justice, were found guilty by the verdict of the jury and sentenced to pay a fine of $50 each. They have sued out this writ of error.

Miller is 33 years of age, Garbell 27; both are lawyers, and there is evidencein the record that prior to this indictment each of the defendants was of good reputation. Joseph Weisbrod, Solomon Yaffa and Julius Leavitt, Morris Mann and Louis Meyer were also indicted on the same charge.

January 14, 1937, Weisbrod, Leavitt and Yaffa, armed, held up and robbed Meyer and Mann in their butcher shop. The robbers and their victims although indicted with Miller and Garbell on the conspiracy charge were not tried. They testified for the People. The three robbers earlier on the same evening in which they held up Mann and Meyer, held up a man named Rosset, owner of an automobile, which they took from him and used in robbing the butcher shop. Six days later the three were arrested in the company of Henry Kraft and a girl named Velma Graves. At the time of the arrest they had in their possession two revolvers and a black-jack. They had set out early that evening for the purpose of committing another robbery. Two indictments were returned against these three charging them with these robberies. They pleaded not guilty in those cases. In this case they testified to facts showing their

THE PEOPLE OF THE STATE OF
ILLINOIS,
Defendant in Error,

vs.

LEO MILLER and GORDON DARSELL,
Plaintiffs in Error.

ERROR TO CRIMINAL COURT
OF COOK COUNTY.

296 I.A. 636

MR. JUSTICE ESTERLY DELIVERED THE OPINION OF THE COURT.

Defendants, Darsell and Miller, upon trial by jury on an indictment charging a conspiracy to obstruct justice, were found guilty by the verdict of the jury and sentenced to pay a fine of $50 each. They have sued out this writ of error.

Miller is 23 years of age, Darsell 27; both are lawyers, and there is evidence in the record that prior to this indictment each of the defendants was of good reputation. Joseph Weisford, Solomon Yuffa and Julius Leavitt, Morris Lynn and Louis Meyer were also indicted on the same charge.

January 14, 1927, Weisford, Leavitt and Yuffa, armed, held up and robbed Meyer and Lynn in their butcher shop. The robbers and their victims although indicted with Miller and Darsell on the conspiracy charge were not tried. They testified for the People. The three robbers earlier on the same evening in which they held up Lynn and Meyer, held up a man named Rosset, owner of an automobile, which they took from him and used in robbing the butcher shop. Six days later the three were arrested in the company of Henry Ewalt and a girl named Velma Graves. At the time of the arrest they had in their possession two revolvers and a blackjack. They had set out early that evening for the purpose of committing another robbery. Two indictments were returned against these three charging them with these robberies. They pleaded not guilty in those cases. In this case they testified to facts showing their

guilt. Sol Yaffa and Leavitt said that they hoped to receive consideration for their testimony in the conspiracy case. Weisbrod said he did not know whether he would receive consideration for his testimony. Leavitt and Weisbrod had been formerly confined at St Charles. They were previously acquainted with Sol Yaffa. Isadore Yaffa, a brother of Sol, and Samuel Miller, a relative by marriage, also testified for the State in the conspiracy trial, "hoping," as they said, to receive consideration for their relative. Leavitt was well known to Mann and Meyer; his mother was a customer. Henry Kraft, who was with the robbers and Miss Graves when they were arrested, was a brother-in-law of Mann and a cousin of defendant Garbell. Meyer and Mann immediately after the robbery of January 14, reported it to the police. ~~Weisbrod~~ Leavitt says that Meyer saw the three robbers on January 21, the day after the arrest, at a "show-up" at the Detective bureau. Although Meyer had given a detailed description of the robbers to the police, he did not accuse them at that time. Garbell at that time had not as yet talked to the three robbers, and Leo Miller had not then become connected with the matter in any way. About January 24 Abraham Weisbrod, a brother of Joseph, who was a post-office clerk, and George Kraft, who worked for the International Harvester company, visited the butchers for the purpose of securing leniency for their brothers. This was without the knowledge of either Garbell or Miller. Meyer and Mann refused to talk about the matter except in the presence of their lawyer; they directed Weisbrod and Kraft to go to Meyer's home that evening to meet their lawyer, defendant Leo Miller. Miller had been attorney for Meyer and Mann for many years; he had incorporated their business and attended to other legal matters. When Weisbrod and Kraft called that evening at the Meyer home, Miller was there but left after declining to listen to the visitors. Meyer says he does not remember the conversation which took place at that time.

guilt. Del Yatts and Leavitt said that they hoped to receive consideration for their testimony in the contingency case. Leavitt said he did not know whether he would receive consideration for his testimony. Leavitt and Bellstrand had been formerly confined at St. Charles. They were previously acquainted with Del Yatts. Leadore Yatts, a brother of Del, and Daniel Miller, a relative by marriage, also testified for the State in the conspiracy trial, "hoping," as they said, to receive consideration for their relative. Leavitt was well known to Mayer and Dwyer; his father was a gambler. Henry Kraft, who was with the robbers and blew Graves when they were arrested, was a brother-in-law of Mayer and a cousin of Leadore Yatts. Mayer and Dwyer immediately after the robbery of January 14, reported it to the police. Leavitt made sure that Dwyer saw the three robbers on January 21, the day after the arrest, at a "conference" at the Detective rooms. Dispatch paper had given a detailed description of the robbers in the papers, he did not succeed then at that time. Dwyer's at all time did not as yet talked to the three robbers, and the Miller had not then become connected with the matter in any way. Henry Tuckey of Arkansas Valentine, a brother of Jessie, who was a cowboy-like character, and George Kraft, who worked for the International Harvester company, visited the butchers for the purpose of securing Lindsey for their brothers. It was without the knowledge of either Bellstrand or Miller. Dwyer had been induced to talk about the matter secret in the presence of their lawyer; they directed Valentine and Kraft to go to Dwyer's home that evening to meet their lawyer, Attorney Lee Miller. Miller had been attorney for Dwyer and Sam for many years; he had investigated their business and attended to their legal matters. When Valentine and Kraft called that evening on the Dwyer case, Miller was there but left after declining to listen to the relations. Dwyer says he does not remember the conversation which took place at that time.

On the night of January 20th Garbell was asked by George Kraft to procure the release of his brother Henry. He visited the relatives of the defendants who were then in custody, and received authority to represent all the defendants except Miss Graves. The next day he succeeded in getting defendants booked on a charge of carrying concealed weapons. At 7 p. m. of that day he talked with Joseph Weisbrod, Sol Yaffa and Julius Leavitt for the first time; that was the same evening on which Miller refused to talk with the relatives who interceded for defendants at the Meyer home.

January 23rd Joseph Weisbrod, Sol Yaffa, Leavitt and Kraft were released on bail through the efforts of Garbell, who had received various sums of money for his services from their relatives. From January 25th until the trial held February 4th, defendants and their relatives had numerous conferences with Garbell in his office. Julius Leavitt (alone of all the witnesses) says that defendant Miller was at this time in contact with Garbell. Leavitt testified to a meeting between Garbell and Miller at which Miller said he represented the butchers and unless payment was made for the loss sustained by Mann and Meyer a warrant would be sworn out in 24 hours. He gives in detail obscene language by Miller to that effect.

Weisbrod, Yaffa, Leavitt, Samuel Miller and Isadore Yaffa say that the matter of repayment to the butchers was discussed by Garbell with those present. Garbell denies this and is corroborated by Abraham Weisbrod and George Kraft. The evidence shows that there was paid in all to Garbell the sum of $490, of which he used $125 in securing the service of another lawyer who tried the concealed weapons case. Leavitt, Weisbrod, and Sol Yaffa were released on probation for six months. The source from which some of the money was raised to pay Garbell was concealed from him, as one of the witnesses says, to prevent an overcharge.

February 10, 1937, Leo Miller mailed to Meyer a check for

On the night of January 20th Garfell was used by George first to procure the release of his brother Harry. He visited the relatives of the defendants who were then in custody, and received authority to represent all the defendants among them. The next day he succeeded in getting defendants bailed on a charge of carrying concealed weapons. At 7 p. m. of that day he talked with Joseph Weisbord, Sol Yelle and Julius Leavitt for the first time; that was the same evening on which Miller refused to talk with the relatives who interceded for defendants at the Geyer home.

January 22nd Joseph Weisbord, Sol Yelle, Leavitt and Ferft were released on bail through the efforts of Garfell, who had received various sums of money for his services from their relatives. From January 22d until the trial held February 4th, defendants and their relatives and attorneys conferred with Garfell in his office. Julius Leavitt (along with all the witnesses) says that defendant Miller was at all times in conflict with Garfell. Leavitt testified to a meeting between Garfell and Miller at which Miller said he regretted the interference the writer present was made via the loss sustained by Gomez and desired a warrant which he swore out in Ed Boyle. He gives in detail obscene language by Miller to that effect.

Weisbord, Yelle, Leavitt, Samuel Miller and Isadore Yelle say that the matter of repayment to the butchers was discussed by Garfell with their present. Yarbell makes this and is corroborated by Abraham Feldman and George Ferft. The witnesses agree that there was paid in all to Garfell the sum of $200, of which he used $145 in securing the services of another lawyer who tried the criminal weapons case. Leavitt, Weisbord, and Sol Yelle were released on probation for six months. The $55 more left which were at the money was turned in by Garfell was concealed from him, as one of the witnesses says, to prevent an overcharge.

February 1st, 1917, Geo Miller called to Meyer a check for

$200 drawn on the Marquette Trust & Savings Bank. Miller testifies that this was a loan to Meyer and Mann made at Meyer's request. Miller also testified that he had made similar loans at previous times and in corroboration produced another check given in 1935 for $45 to the order of Meyer and Mann. Meyer and Mann told the police captain, when questioned by him, that the check represented a loan. Upon this trial Meyer testified that Miller told him to make that explanation, and also testified that Mann told him he (Mann) had been instructed likewise by defendant Miller. Meyer and Mann, temporarily released after their arrest, were directed by the police to go to the State's Attorney's office where they again said the $200 check from defendant Miller was sent as a loan. Meyer says thereupon he was beaten and kicked in the prosecutor's office; at the trial of this case he exhibited a scar on his leg as evidence. After this beating and threats that his place of business would be closed Meyer says he told "the truth." Mann also said that he was slapped in the face and struck on the head, whereupon he too desired to tell "the truth."

Early on the morning of the day following Leo Miller went to the butcher shop (as Meyer and Mann testify) and inquired how they made out in the office of the State's Attorney. Meyer told Miller that he had been forced by threats and violence to tell a story incriminating him, whereupon Miller demanded the return of the money and denounced Meyer as a liar.

February 14th or 15th Sol Yaffa, Leavitt and Weisbrod were again arrested, and Leavitt says (which is undenied) that he was beaten and tortured. February 14th Miller, at the request of Mann, went to the Detective bureau and there met Meyer with the police officer, and told Meyer if he saw the boys who had robbed him he should identify them. Defendants Miller and Garbell denied that they ever met each other before their arrest on this charge,

$200 drawn on the Marquette Trust & Savings Bank. Miller testified that this was a loan to Meyer and Mann made at Meyer's request. Miller also testified that he had made similar loans at previous times and in correspondence produced another check, given in 1932 for $45 to the order of Meyer and Mann. Meyer and Mann told the police captain, when questioned by him, that the check represented a loan. Upon this trial Meyer testified that Miller told him to make that explanation, and also testified that Mann told him he (Mann) had been interrogated likewise by defendant Miller. Meyer and Mann, temporarily released after their arrest, were interred by the police to go to the State's attorney's office where they again said the $200 check from defendant Miller was sent as a loan. Meyer says thereupon he was beaten and kicked in the prosecutor's office; at the trial of this case he exhibited a scar on his leg as evidence. After this beating, and threats that his place of business would be closed Meyer says he told "the truth." Mann also said that he was slapped in the face and struck on the head, whereupon he too desired to tell "the truth."

Early on the morning of the day following Leo Miller went to the watchmaker shop (as Meyer and Mann testify) and inquired how they made out in the office of the state's attorney. Meyer told Miller that he had been forced by threats and violence to tell a story incriminating him, whereupon Miller demanded the return of the money and threatened Meyer as a liar.

February 14th or 15th Sol Veltz, Beyerlit and Valdrod were again arrested, and Beyerlit says (which is undenied) that he was beaten and tortured. Thereupon Leo Miller, at the request of Mann, went to the Detective Bureau and there met Meyer with the police officer, and told Meyer if he saw the boys who had robbed him he should identify them. Defendants Miller and Gerhardt testified that they never met each other before their arrest on this charge.

and denied in detail any knowledge of the payment of any money to stop the prosecution of the case against the robbers.

It is contended in behalf of defendants that the judgment should be reversed because it is based upon the testimony of accomplices, which is not materially corroborated, is inherently improbable and otherwise discredited. Defendants cite with other cases People v. Reznik, 361 Ill. 145; People v. Rendas, 366 Ill. 385; Morrison v. Beers, 327 Ill. 139; People v. LeMorte, 289 Ill., 11, and Stephens v. Hoffman, 275 Ill. 497. Reviewing the evidence they say that the conviction should not be allowed to stand as to the defendants. On the other hand, the State contends that the question of guilt was for the jury, and that a conviction may be sustained on uncorroborated testimony of accomplices if the jury is convinced of guilt beyond a reasonable doubt. With other cases they cite the recent case of People v. Karatz, 365 Ill. 255.

We shall not undertake to further review the evidence. The decisions of the courts are to the effect that in such cases where the evidence is conflicting and close, that a conviction may be sustained, it must appear that the record is in other respects free from prejudicial error. People v. Borella, 362 Ill. 218; People v. Deal, 357 Ill. 634. We think this record shows the rulings of the court on the admission of evidence were substantially erroneous. The trial court permitted a witness (a police officer) to tell the jury that Solomon Yaffa told him, on or about February 15th, that Yaffa's brother had given the money to pay off Mann and Meyer for the money taken in the robbery to Yaffa's cousin, Sam Miller, who had turned it over to Garbell, the lawyer, who in turn gave it to Leo Miller, the attorney for Mann and Meyer, and that he, Miller, had actually turned it over to them. We hold the admission of this evidence was erroneous.

In conspiracy cases statements and declarations of co-

and denied in detail any knowledge of the payment of any money to stop the prosecution of the case against the robbers.

It is contended in behalf of defendants that the judgment should be reversed because it is based upon the testimony of co-conspirators, which is not materially corroborated, is inherently improbable and otherwise discredited. Defendants cite with other cases People v. Mennik, 181 Ill. 146; People v. Gardner, 266 Ill. 385; Morrison v. Beers, 327 Ill. 139; People v. Dworkin, 259 Ill., 11, and Stephens v. Gottlieb, 275 Ill. 427. Reviewing the evidence they say that the conviction should not be allowed to stand as to the defendants. On the other hand, the State contends that the question of guilt was for the jury, and that a conviction may be sustained on uncorroborated testimony of accomplices if the jury is convinced of guilt beyond a reasonable doubt. With other cases they cite the recent case of People v. Arvia, 365 Ill. 435.

We shall not undertake to further review the evidence. The decisions of the courts are to the effect that in such cases where the evidence is conflicting and close, that a conviction may be sustained, it must appear that the record is in other respects free from prejudicial error. People v. Morella, 352 Ill. 218; People v. Deal, 327 Ill. 634. We think this record shows the rulings of the court on the admission of evidence were substantially erroneous. The trial court permitted a witness (a police officer) to tell the jury that Solomon Yatta told him, on or about February 15th, that Yatta's brother had given the money to pay off Ramm and Meyer for the money taken in the robbery to Yatta's cousin, Sam Miller, who had turned it over to Gardell, the lawyer, who in turn gave it to Leo Miller, the attorney for Ramm and Meyer, and that he, Miller, had actually turned it over to them. We hold the admission of this evidence was erroneous.

In conspiracy cases the words and declarations of co-

conspirators made to accomplish or further the purpose of the conspiracy are admissible, although made out of the presence of the defendants. This apparent exception to the hearsay rule is based on the nature of the crime of conspiracy, in which the conspiracy having been formed the acts and words of each conspirator said or done in furtherance of the conspiracy is binding upon each and all of the conspirators. On the contrary, words which have no tendency to further the conspiracy, which are mere naratives as to what has been or will be done, are incompetent and should not be admitted except as against the defendants making them or in whose presence they were made. Spies v. People, 122 Ill., 1, 237; Samples v. People, 121 Ill., 547, 551; People v. Bither, 231 Ill. App., 301; People v. Patris, 360 Ill., 596. Miller was not present when Sol Yaffa is said to have made these statemants. It was error to admit the evidence and very prejudicial since it was given by a witness who was not discredited as were many others who testified in the case.

The record also shows that the First Assistant State's Attorney of Cook county was permitted to testify in behalf of the People not only to his version of the amounts of money collected by Garbell from his clients, a transaction with which M iller admittedly had nothing whatever to do, but to interject the statement to the effect that the charges for Garbell's services were exorbitant. The State does not in fact contend that this evidence was admissible. The State makes the technical answer that the evidence cannot be reviewed because, they say, there is no motion for a new trial in the abstract of the bill of exceptions. While it was not abstracted, the bill of exceptions does show that a motion for a new trial was made and overruled. We would be reluctant to deny to any defendant a substantial right for such a purely technical reason. However, the Supreme court has held that even in the

conspirators made to accomplish or further the purpose of the conspiracy are admissible, although made out of the presence of the defendants. This apparent exception to the hearsay rule is based on the nature of the crime of conspiracy, in which the conspiracy having been formed the acts and words of each conspirator said or done in furtherance of the conspiracy is binding upon each and all of the conspirators. On the contrary, words which have no tendency to further the conspiracy, which are mere narratives as to what has been or will be done, are incompetent and should not be admitted except as against the declarants making them or in whose presence they were made. People v. Fonda, 182 Ill., 1, 327; Beverlee v. People, 123 Ill., 547, 351; People v. Bither, 231 Ill. App., 301; People v. Lytle, 350 Ill., 396. Miller was not present when Sol Yatta is said to have made these statements. It was error to admit the evidence and very prejudicial since it was given by a witness who was not discredited as were others who testified in the case.

The record also shows that the First Assistant State's Attorney of Cook county was permitted to testify in behalf of the People not only to his version of the amounts of money collected by Darbell from his clients, a transaction with which M iller admittedly had nothing whatever to do, but to interject the statement to the effect that the charges for Darbell's services were excessive. The State does not in fact contend that this evidence was admissible. The State makes the technical answer that the evidence cannot be reviewed because, they say, there is no motion for a new trial in the abstract of the bill of exceptions. While it was not abstracted, the bill of exceptions does show that a motion for a new trial was made and overruled. We would be reluctant to deny to any defendant a substantial right for such a purely technical reason. However, the Supreme Court has held that even in the

absence of a motion for a new trial the question of whether incompetent evidence was admitted over objection of defendant may be reviewed. People v. Perlmutter, 306 Ill. 495; People v. Majczek, 360 Ill., 261, 267. The former rule requiring the motion for a new trial to be preserved in the bill of exceptions is no longer applicable. It is sufficient if it appears from the record that a motion for a new trial was in fact made and overruled. People v. Kelly, 285 Ill. App. 57. Moreover, whether guilty or innocent, defendants were entitled to be tried according to the law of the land.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

O'Connor, P. J., and McSurely, J., concur.

absence of a motion for a new trial the question of whether incompetent evidence was admitted over objection of defendant may be reviewed. People v. Perlmutter, 308 Ill. 490; People v. Salgren, 324 Ill., 261, 267. The former rule requiring the motion for a new trial to be preserved in the bill of exceptions is no longer applicable. It is sufficient if it appears from the record that a motion for a new trial was in fact made and overruled. People v. Kelly, 285 Ill. App. 57. Moreover, whether guilty or innocent, defendants were entitled to be tried according to the law of the land.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

O'Connor, P. J., and McGurchy, J., concur.

40098-40099

PEOPLE OF THE STATE OF ILLINOIS,
Appellant,

vs.

FRED H. SMITH,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

296 I.A. 636

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

On July 19, 1937, two proceedings by way of information were filed against defendant Smith in the Municipal court of Chicago. The first was docketed as General No. 1,478,981; the second as 1,478,982. In each case the information charged that defendant Smith was guilty of a violation of Paragraph 439, Chapter 38, which defines the crime of tampering with any motor vehicle. (See Hurd's Revised Statutes, 1935, chap. 38, p. 1185.)

The first information charged that defendant wilfully and unlawfully and without the consent of the owner, one Barney Swierenga, shifted, changed or moved the starting device or mechanism of a motor vehicle, namely, a Nash sedan automobile. In the second case the information charged defendant with a similar offense in tampering in the same manner with a Plymouth sedan automobile owned by Joseph Lamka in violation of the same statute. The defendant was admitted to bail and the trial postponed in each case until July 23, 1937. On that day he was arraigned, and as the record shows, pleaded guilty, the court having advised him of his rights (including his right to trial by jury) and explained the consequences of a plea of guilty; defendant persisted in his plea. The court received and recorded the pleas, examined witnesses as to aggravation and mitigation of the offense, and in each case found defendant guilty as charged, entered judgment with sentence to pay a fine of $50 and to be confined in the House of Correction for six months.

As near as we can ascertain from the confused record pre-

PEOPLE OF THE STATE OF ILLINOIS, Appellant,	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
vs.	
JOHN E. SMITH, Appellee.	

MR. JUSTICE MACNETT DELIVERED THE OPINION OF THE COURT.

On July 19, 1937, two proceedings by way of information were filed against defendant Smith in the municipal court of Chicago. The first was docketed as General No. 1,478,981; the second as 1,478,982. In each case the information charged that defendant Smith was guilty of a violation of Paragraph 453, Chapter 34, which defines the crime of tampering with any motor vehicle. (See Ill. Revised Statutes, 1935, ch. 34, p. 1185.)

The first information charged that defendant wilfully and unlawfully and without the consent of the owner, one Berney Swierenga, shifted, changed or moved the starting device or mechanism of a motor vehicle, namely, a Hudson sedan automobile. In the second case the information charged defendant with a similar offense in tampering with a Plymouth sedan automobile owned by Joseph Lunka in violation of the same statute. The defendant was admitted to bail and the trial postponed in each case until July 23, 1937. On that day he was arraigned, and as the record shows, pleaded guilty, the court having advised him of his rights (including his right to trial by jury) and explained the consequences of a plea of guilty; defendant persisted in his plea. The court received and recorded the pleas, examined witnesses as to aggravation and mitigation of the offense, and in each case found defendant guilty as charged, entered judgment with sentence to pay a fine of $[illegible] to be confined in the house of correction for six months.

As near as we can ascertain from the contracted record pre-

sented, the next proceeding in the matter took place on September 20, 1937, when defendant presented a motion in the nature of writ of error coram nobis, as provided for in section 21 of the Municipal Court act and the Rules of the Municipal court. (Rule 209 c.)

Defendant's petition stated that defendant was not guilty of the tampering alleged or violation of any law; that at the trial he was not represented by counsel and had no opportunity of procuring counsel to represent him and advise him of his rights; that he was of a highly nervous and excitable temperament and had a great fear of the courts and of court procedure, and that due to this condition he was rendered speechless at the hearing, and was therefore unable to present testimony showing a meritorious defense; that at the trial he was advised by the arresting officer to plead guilty, and that in such case he would be discharged, and that taking the officer's word for it he pleaded guilty; that he was free from any negligence and guilty of no fault in failing to apprise the court of his mental condition and the facts surrounding the case; that the facts did not appear of record and were then and there unknown to the court; that had the court known said facts the court would not have rendered the judgment against him. The petition in each case prayed for a new trial, and that petitioner be discharged.

The State's Attorney made a motion to dismiss the petition and on the same day (namely, September 20, 1937) the motion was granted and the petition dismissed. On November 8, 1937, the defendant (in each case) presented to the court a motion asking that the order of September 20, 1937, denying defendant's petition, be vacated and set aside and a further hearing had upon the petitions filed. The motion was (in each case) supported by an affidavit or petition which stated that defendant had been charged as heretofore alleged; that he was not represented by counsel; had no opportunity

sented, the next proceeding in the matter took place on September 20, 1927, when defendant prosecuted a motion in the nature of writ of error coram nobis, as provided for in section 1 of the municipal Court act and the laws of the municipal court. (Ill. 209 c.)

Defendant's petition stated that defendant was not guilty of the tampering alleged or violation of any law; that at the trial he was not represented by counsel and had no opportunity of procuring counsel to represent him and advise him of his rights; that he was at a highly nervous and excitable temperament and had a great fear of the courts and of court proceedings, and that due to this condition he was restored speechless at the hearing, and was therefore unable to present testimony showing a satisfactory defense; that at the trial he was advised by the arresting officer to plead guilty, and that in such case he would be discharged, and that taking the officer's word for it he pleaded guilty; that he was free from any negligence and guilty of no fault in failing to exercise the care of his mental condition and the facts surrounding the case; that the facts did not appear of record and were then and there unknown to the court; that had the court known said facts the court would not have rendered the judgment against him. The petition in such case prays for a new trial, and that petitioner be discharged.

The State's Attorney made a motion to dismiss the petition and on the same day (namely, September 20, 1927) the motion was granted and the petition dismissed. On November 8, 1927, the defendant (in such case) presented to the court a motion asking that the order of September 20, 1927, denying defendant's petition, be vacated and set aside and a further hearing had upon the petitions filed. The motion was (in such case) supported by an affidavit or petition which stated that defendant had been charged as heretofore alleged; that he was not represented by counsel; had no opportunity

of procuring counsel to represent him and advise him of his rights; was of a highly nervous and excitable temperament, had a great fear of the courts and of court procedure, and due to this condition was rendered speechless at the hearing; that he was therefore unable to set up testimony of a meritorious defense; that at the trial, due to his nervous condition, "he could not distinguish between right and wrong and, therefore, being insane for the period of time in which the case was being heard, he was unable to apprise the court of the fact that the two arresting officers had told him to plead guilty and the case would be over and he would be given probation. Taking the officers' word for it, due to the fact of his insanity his plea was that of guilty." The affidavit further alleged that the advise of the arresting officers to him was a gross and wilful fraud upon the court, and therefore the defendant was deprived of presenting his testimony of his crazed condition at the time the said tampering was alleged to have taken place. The petition was filed and a rule entered on the State's Attorney to answer instanter. The State's Attorney on November 30, 1937, made a motion to strike the petition, which was denied. The motion for a new trial was allowed and the cause set for trial on December 3, 1937. Defendant being again arraigned pleaded not guilty, elected to waive trial by jury, and the cause was by agreement between the parties submitted to the court for trial. The court after hearing the evidence found defendant guilty as charged and ordered that the finding be entered of record. On the same day, (December 16, 1937) defendant filed in the cause an application to be admitted to release on probation. The court heard the evidence, found that defendant had never previously been convicted of any crime or misdemeanor, that he had no means wherewith to pay any fine; that the offense was such that defendant might be admitted to release on probation, and it appearing to the satisfaction of the court that there was reasonable ground to expect de-

of procuring counsel to represent him and advise him of his rights; was of a highly nervous and excitable temperament, had a great fear of the courts and of court procedure, and due to this condition was rendered speechless at the hearing; that he was therefore unable to set up testimony of a meritorious defense; that at the trial, due to his nervous condition, "he could not distinguish between right and wrong and, therefore, being insane for the period of time in which the case was being heard, he was unable to convince the court of the fact that the two arresting officers had told him to plead guilty and the case would be over and he would be given probation. Taking the officers' word for it, due to the fact of his insanity his plea was that of guilty." The affidavit further alleged that the advice of the arresting officers to him was a gross and willful fraud upon the court, and therefore the defendant was deprived of presenting his testimony of his crazed condition at the time the said sentencing was alleged to have taken place. The petition was filed and a rule entered on the State's Attorney to answer instanter. The State's Attorney on November 30, 1937, made a motion to strike the petition, - it was denied. The motion for a new trial was allowed and the cause set for trial on December 3, 1937. Defendant being again arraigned pleaded not guilty, elected to waive trial by jury, and the cause was by agreement between the parties submitted to the court for trial. The court after hearing the evidence found defendant guilty as charged and ordered that the finding be entered of record. On the same day, (December 16, 1937) defendant filed in the cause an application to be admitted to release on probation. The court read the evidence, found that defendant had never previously been convicted of any crime or misdemeanor, that he had no means wherewith to pay any fine; that the offense was such that defendant might be admitted to release on probation, and it appearing to the satisfaction of the court that there was reasonable ground to expect de-

fendant might be reformed, and that the interests of society would be subserved if he was released on probation, it was ordered the application be granted. He was placed on probation for a period of one year. From the order of December 16th the People have prosecuted these appeals, which have been consolidated for hearing in this court as Nos. 40098 and 40099.

The evidence heard has not been preserved. Defendant has not appeared to support the judgment. The State points out that the motion substituted for the writ of error coram nobis at common law by section 72 of the Practice act and section 21 of the Municipal Court act has not extended the scope of the proceeding; that as the writ was limited so the motion is limited to the correction of errors of fact which, if known to the trial court, would have prevented the entry of the judgment. It has been so held in numerous cases of which it will be sufficient to cite People v. Crooks, 326 Ill. 266, and Jacobson v. Ashkinaze, 337 Ill., 141. Practically all the cases hold (and there is no case to the contrary so far as we are advised) that the insanity of a defendant at the time of the trial was one of the errors of fact which could be corrected by the writ and may be corrected by the motion. People v. Bruno, 346 Ill. 449.

The State's Attorney objects that the petition of defendant stated merely conclusions and says that defendant must have known of the alleged error of fact at the time of the original trial. We assume that a person insane could not be found to have such knowledge. The State challenged the sufficiency of the petition on the grounds now urged for reversal but was overruled by the court, the motion to strike being denied. The appeal is taken from the judgment entered December 16, 1937, not from the order of November 30, 1937, denying the motion of the State's Attorney to strike. The State took part in the trial and the evidence upon which the court

fendant might be reformed, and that the interests of society would be subserved if he was released on probation, it was ordered the application be granted. He was placed on probation for a period of one year. From the order of December 10th the people have prosecuted these appeals, which have been consolidated for hearing in this court as Ios. 40095 and 40096.

The evidence heard has not been preserved. Defendant was not appointed to support the judgment. The state points out that the motion substituted for the writ of error coram nobis at common law by section 79 of the Practice act and section 21 of the Municipal Court act has not extended the scope of the proceeding; that as the writ was limited so the motion is limited to the correction of errors of fact which, if known to the trial court, would have prevented the entry of the judgment. It has been so held in numerous cases of which it will be sufficient to cite People v. Hooks, 326 Ill. 356, and Jacobson v. People, 327 Ill. 171. Practically all the cases hold (and there is no case to the contrary so far as we are advised) that the insanity of a defendant at the time of the trial was one of the errors of fact which could be corrected by the writ and may be corrected by the motion. People v. Ortiz, 346 Ill. 449.

The state's attorney objects that the petition of defendant stated merely conclusions and says that defendant must have known of the alleged error of fact at the time of the original trial. He assumes that a person insane could not be found to have been knowledge. The state challenged the sufficiency of the petition on the grounds now urged for reversal but was overruled by the court, the motion to strike being denied. The appeal is taken from the judgment entered December 16, 1927, not from the order of November 30, 1927, denying the motion of the state's Attorney to strike. The state took part in the trial and the evidence upon which the court

acted is in the record. For aught we can guess, competent medical and other evidence may have been submitted tending to show that defendant was insane at the time of the first trial beyond a reasonable doubt. The record is very much confused. It has been difficult to ascertain the time sequence of events preserved. In this condition of the record we hold the judgment should not be reversed. It is affirmed.

AFFIRMED.

O'Connor, P. J., and McSurely, J., concur.

sted in the record. For sight or six years, substantial medical and other evidence may have been submitted tending to show that defendant was insane at the time of the first trial beyond a reasonable doubt. The record is very much cluttered. It has been difficult to ascertain the time sequence of events presented. In this condition of the record we will the judgment should not be reversed. It is affirmed.

AFFIRMED.

O'Donovan, P. J., and McCrady, J., concur.

40099

PEOPLE OF THE STATE OF ILLINOIS,
Appellant,

vs.

FRED H. SMITH,
Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

296 I.A. 636

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The record in this appeal presents issues of fact and law similar to those which appear in People of State of Illinois v. Fred H. Smith, Gen. No. 40098, in which an opinion has this day been filed. These issues of fact and law are fully discussed in that opinion.

For the reasons there stated in this appeal also the judgment of the trial court is affirmed.

AFFIRMED.

O'Connor, P. J., and McSurely, J., concur.

PEOPLE OF THE STATE OF ILLINOIS,
Appellant,

vs.

ALBERT E. SMITH,
Appellee.

APPEAL FROM CRIMINAL COURT
of Cook Co.

296 I.A. 636

MR. JUSTICE MCCURDY DELIVERED THE OPINION OF THE COURT.

The record in this appeal presents issues of fact and law similar to those which appear in People of State of Illinois v. Fred J. Smith, Ann. No. 40098, in which an opinion this day been filed. Those issues of fact and law are fully discussed in that opinion.

For the reasons there stated in this appeal also the judgment of the trial court is affirmed.

AFFIRMED.

O'Connor, P. J., and McCurdy, J., concur.

39717

CATHERINE FOLEY,
Appellant,

v.

FAYE MITTY,
Appellee.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE FRIEND
DELIVERED THE OPINION OF THE COURT.

Catherine Foley brought suit to recover damages for personal injuries sustained by her while riding as a guest in an automobile driven by defendant, which collided with a heavy fuel truck. The complaint consisted of three counts, each charging wilful and wanton conduct on the part of defendant. Trial was had by jury, resulting in a verdict finding defendant guilty and assessing plaintiff's damages in the sum of $1,000. Defendant thereupon filed two written motions, one asking that the court enter judgment in favor of defendant notwithstanding the verdict, and the other for a new trial in the event the court should overrule the first motion. The court continued the motion for a new trial, and upon the hearing thereof entered a judgment in favor of defendant and against plaintiff notwithstanding the verdict, from which this appeal is taken.

The facts disclose that plaintiff was employed to do housework in the home of defendant at a stipulated salary, $7 a week. On the day of the accident, December 6, 1934, she accepted her employer's invitation to ride as a guest in defendant's automobile from her home to the loop. The parties left defendant's home in a two-seated Auburn coupe. Defendant was at the wheel and plaintiff sat

39717

CATHERINE ROLEY,
Appellant,

v.

MAYA MITTY,
Appellee.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

296 I.A. 636

MR. PRESIDING JUSTICE MCGINN
DELIVERED THE OPINION OF THE COURT.

Catherine Roley brought suit to recover damages for personal injuries sustained by her while riding as a guest in an automobile driven by defendant, which collided with a heavy fuel truck. The complaint consisted of three counts, each charging willful and wanton conduct on the part of defendant. Trial was had by jury, resulting in a verdict finding defendant guilty and assessing plaintiff's damages in the sum of $1,000. Defendant thereupon filed two written motions, one asking that the court enter judgment in favor of defendant notwithstanding the verdict, and the other for a new trial in the event the court should overrule the first motion. The court sustained the motion for a new trial, and upon the hearing thereof entered a judgment in favor of defendant and against plaintiff notwithstanding the verdict, from which this appeal is taken.

The facts disclose that plaintiff was employed to do housework in the home of defendant at a stipulated salary, $7 a week. On the day of the accident, December 6, 1954, she accepted her employer's invitation to ride as a guest in defendant's automobile from her home to the Loop. The parties left defendant's home in a two-seated Auburn coupe. Defendant was at the wheel and plaintiff sat

to her right. Irving avenue runs north and south, and meets Granville avenue, a through street running east and west, on the north side thereof. The intersection is what is known as a "T" intersection, and Irving avenue does not cross or intersect Granville at the south side thereof. The south side of Granville avenue, at Irving avenue, is the north boundary of a cemetery, and has a large wire or metal fence at the boundary line. The northeast corner of the two streets is vacant and open, and an apartment building is located on the northwest corner.

It appears from the evidence that Irving avenue has a compact covering of gravel and tar, and Granville avenue is paved with asphalt. It is conceded that on the day of the accident both streets were covered with snow and ice and were slippery. Irving avenue is approximately 30 feet wide from curb to curb, and Granville avenue is about 50 feet in width. On the northwest corner, about 20 feet north of Granville avenue, and on the west side of Irving avenue, is a stop sign facing north, directing traffic to stop before entering Granville avenue, a preferential or through street.

Defendant, who was familiar with the neighborhood, having driven over the intersection several times a day, knew of the stop sign at the northwest corner. She was driving her automobile in a southerly direction near the middle of Irving avenue, as she approached Granville avenue, at a speed of about 25 to 30 miles an hour. As she approached Granville avenue the car skidded and she came into collision with a westbound motor fuel truck on the south half of Granville avenue, about half way across Irving avenue. In an effort to avoid the collision the truck driver swerved his vehicle to the left, in order to give defendant more room within the intersection, but defendant's car did not stop in time and struck the right front side of the truck at a point approximately above the hub of the right front wheel. After

to her right. Irving avenue runs north and south, and meets Granville avenue, a through street running east and west, on the north side thereof. The intersection is what is known as a "T" intersection, and Irving avenue does not cross or intersect Granville at the south side thereof. The south side of Granville avenue, at Irving avenue, is the north boundary of a cemetery, and has a large wire or metal fence at the boundary line. The northeast corner of the two streets is vacant and open, and an apartment building is located on the northwest corner.

It appears from the evidence that Irving avenue has a compact covering of gravel and tar, and Granville avenue is paved with asphalt. It is conceded that on the day of the accident both streets were covered with snow and ice and were slippery. Irving avenue is approximately 30 feet wide from curb to curb, and Granville avenue is about 30 feet in width. On the northwest corner, about 20 feet north of Granville avenue, and on the west side of Irving avenue, is a stop sign facing north, directing traffic to stop before entering Granville avenue, a preferential or through street.

Defendant, who was familiar with the neighborhood, having driven over the intersection several times a day, knew of the stop sign at the northwest corner. She was driving her automobile in a southerly direction near the middle of Irving avenue, as she approached Granville avenue, at a speed of about 25 to 30 miles an hour. As she approached Granville avenue the car skidded and she came into collision with a westbound motor fuel truck on the south half of Granville avenue, about half way across Irving avenue. In an effort to avoid the collision the truck driver swerved his vehicle to the left, in order to give defendant more room within the intersection, but defendant's car did not stop in time and struck the right front side of the truck at a point approximately above the hub of the right front wheel. After

the impact defendant's car was facing west or northwest, and the truck was facing southwest.

Defendant was thrown from the front seat on her knees to the floor of the car. Her head struck the windshield and the frame thereof, resulting in a hemorrhage of the face and head, also various bruises and contusions over the hands, elbows and both knees. She bled profusely, and was removed to the Edgewater hospital, where X-rays were taken, disclosing a chip fracture of the right thumb. Thereafter a plastic operation was performed on her face and forehead, suturing two deep lacerations over the left side of the forehead and another over her cheek. The attending physician diagnosed the condition of her head as being a marked concussion of the brain. She remained at the hospital approximately a month, and for some time thereafter remained under the doctor's care. The hospital and doctor's bill, amounting to $550, was paid by the truck company, who also gave plaintiff $1,100 under a covenant not to sue.

It is conceded that since this is a so-called "guest" case, plaintiff was not entitled to recover unless defendant was guilty of wilful and wanton conduct; the question of negligence does not enter into the controversy. Upon the question of wilful and wanton conduct, plaintiff offered the testimony of another witness besides herself. Plaintiff testified in substance that on the day in question she had been invited to ride with defendant; that she was sitting in the car, to the right of the driver; that they were riding in the middle of the street, and were about one-quarter of a block away from Granville avenue when she first observed the truck with which they collided; that the truck was then about 75 or 80 feet away and about the same distance from the intersection as was defendant's car; that she had enough experience in riding in automobiles to approximate the speed of a car, and estimated that defendant was driving about 25

the impact defendant's car was facing west or northwest, and the truck was facing southwest.

Defendant was thrown from the front seat on her knees to the floor of the car. Her head struck the windshield and the frame thereof, resulting in a hemorrhage of the face and head, also various bruises and contusions over the hands, elbows and both knees. She bled profusely, and was removed to the Methodist hospital, where X-rays were taken, disclosing a chip fracture of the right thumb. Thereafter a plastic operation was performed on her face and forehead, suturing two deep lacerations over the left side of the forehead and another over her cheek. The attending physician diagnosed the condition of her head as being a marked concussion of the brain. She remained at the hospital approximately a month, and for some time thereafter remained under the doctor's care. The hospital and doctor's bill, amounting to $150, was paid by the truck company, who also gave plaintiff $1,100 under a covenant not to sue.

It is conceded that since this is a so-called "guest" case, plaintiff was not entitled to recover unless defendant was guilty of willful and wanton conduct; the question of negligence does not enter into the controversy. Upon the question of willful and wanton conduct, plaintiff offered the testimony of another witness besides herself. Plaintiff testified in substance that on the day in question she had been invited to ride with defendant; that she was sitting in the car, to the right of the driver; that they were riding in the middle of the street, and were about one-quarter of a block away from Granville avenue when she first observed the truck with which they collided; that the truck was then about 75 or 80 feet away and about the same distance from the intersection as was defendant's car; that she had enough experience in riding in automobiles to approximate the speed of a car, and estimated that defendant was driving about 35

miles an hour or more as they approached Granville avenue. She thought the truck was going at about the same rate of speed. Plaintiff testified further that she had not noticed any stop sign to the right, because she was not familiar with the neighborhood, but the undisputed evidence discloses that there was such a sign. After leaving defendant's house, which was only about two or three blocks from the scene of the accident, no stops were made by defendant up to the time of the impact. Plaintiff's description of the events immediately preceding the accident are as follows: "As our car was passing the corner and entering into Granville, I think it was going even a little faster, maybe between twenty-five and thirty miles an hour. The truck was going west. The truck was to the south side of the street headed west, as the front of our car passed the north curb-line. The truck was headed west when I first saw it, and it then turned south. It was on the north side of the street at first and then turned south to the left of Mrs. Mitty's machine. The truck was to the left or south side of the center of Granville at the time the two cars collided. Our car was around the center of the street at the time. When the truck stopped it was quite a ways from Irving - out in the street on Granville. The front end of it was past Irving avenue, to the west of it, on Granville. Not quite half of the truck was past. *** As we were driving south on Irving and just as I saw the truck, Mrs. Mitty screamed, when the truck was about the same distance away. The truck was about a quarter of a block from the corner when she screamed."

Walter W. Bader, the other witness for plaintiff, was the driver of the truck which collided with defendant's car. He was in the employ of the Silver Flyer Petroleum Company, and was driving a 3-1/2 ton Diamond T tank truck west on Granville avenue. As he approached Irving avenue he saw defendant's car, which, according to

miles an hour or more as they approached Granville avenue. She thought the truck was going at about the same rate of speed. Plaintiff testified further that she had not noticed any stop sign to the right, because she was not familiar with the neighborhood, but the undisputed evidence discloses that there was such a sign. After leaving defendant's home, which was only about two or three blocks from the scene of the accident, no stops were made by defendant up to the time of the impact. Plaintiff's description of the events immediately preceding the accident are as follows: "As our car was passing the corner and entering into Granville, a quick it was going even a little faster, maybe between twenty-five and thirty miles an hour. The truck was going west. The truck was to the south side of the street headed west, as the front of our car passed the north curb-line. The truck was headed west when I first saw it, and it then turned south. It was on the north side of the street at first and then turned south to the left of Mrs. Mitty's machine. The truck was to the left or south side of the center of Granville at the time the two cars collided. Our car was around the center of the street at the time. When the truck stopped it was quite a ways from Irving - out in the street on Granville. The front end of it was past Irving avenue, to the west of it, on Granville. Not quite half of the truck was past. ** As we were driving south on Irving and just as I saw the truck, Mrs. Mitty screamed, when the truck was about the same distance away. The truck was about a quarter of a block from the corner when she screamed."

Walter V. Zeder, the other witness for plaintiff, was the driver of the truck which collided with defendant's car. He was in the employ of the Silver Mixer Petroleum Company, and was driving a 3-1/2 ton Diamond T tank truck west on Granville avenue. As he approached Irving avenue he saw defendant's car, which, according to

his opinion, was being driven along Irving avenue toward the intersection at about 28 miles an hour. His testimony of the events leading up to the collision is as follows: "I was between twenty and twenty-five feet east of where the curbings meet on the east side of Irving and the north side of Granville, when I first observed defendant's car which was then about the same distance north of the north curb line. It was being operated about twenty-eight miles an hour. *** There was a stop sign on the northwest corner, about twenty feet back from the curb. I was familiar with the neighborhood, having driven there repeatedly. I knew that Granville was a through or preferential street. I was operating my truck to the right of the center of the street, and I judge that Mrs. Mitty was operating her car in about the center of the street. It seemed that Mrs. Mitty tried to apply her brakes and make a stop, but that her car started to go faster and that she started sliding. As I was coming west on Granville, I was about twenty feet east of Irving when I noticed that the party in this car, Mrs: Mitty, couldn't stop, so I made a swing to the left to try to prevent an accident which I saw coming. I swung to a southwesterly direction. The left front wheel went over the curb to my left and the right front stopped right up at the curb. Her car came on across the street and hit my right front end. It was the left front of her car that hit mine. Her car swung completely around and was headed west, the same as mine. I got out of my truck, and saw that the lady with her was hurt."

Defendant concedes that in passing on a motion for a judgment notwithstanding the verdict the court must look solely to the evidence of the plaintiff and view it from its aspects most favorable to the plaintiff, but her counsel argue that there is nothing in plaintiff's evidence to justify the verdict finding defendant guilty of wilful and wanton conduct. It is urged that Mrs. Mitty tried to stop, but because of the slippery condition of the pavement was unable to

his opinion, was being driven along Irving avenue toward the intersection at about 30 miles an hour. His testimony of the events leading up to the collision is as follows: "I was between twenty and twenty-five feet east of where the curbing meet on the east side of Irving and the north side of Granville, when I first observed defendant's car which was then about the same distance north of the north curb line. It was being operated about twenty-eight miles an hour. *** There was a stop sign on the northeast corner, about twenty feet back from the curb. I was familiar with the neighborhood, having driven there repeatedly. I knew that Granville was a through or preferential street. I was operating my truck to the right of the center of the street, and I judge that Mrs. Mitty was operating her car in about the center of the street. It seemed that Mrs. Mitty tried to apply her brakes and make a stop, but that her car started to go faster and that she started sliding. As I was coming west on Granville, I was about twenty feet east of Irving when I noticed that the party in this car, Mrs. Mitty, could-n't stop, so I made a swing to the left to try to prevent an accident which I saw coming. I swung to a southwesterly direction. The left front wheel went over the curb to my left and the right front stopped right up at the curb. Her car came on across the street and hit my right front end. It was the left front of her car that hit mine. Her car swung completely around and was headed west, the same as mine. I got out of my truck, and saw that the lady with her was hurt."

Defendant concedes that in passing on a motion for a judgment notwithstanding the verdict the court must look solely to the evidence of the plaintiff and view it from its aspects most favorable to the plaintiff, but her counsel argue that there is nothing in plaintiff's evidence to justify the verdict finding defendant guilty of wilful and wanton conduct. It is urged that Mrs. Mitty tried to stop, but because of the slippery condition of the pavement was unable to

control her car; that it skidded out into Granville avenue, making the impact unavoidable, and although defendant's counsel are willing to concede that defendant might have been guilty of negligence, they say that the evidence, when viewed from its aspects most favorable to plaintiff, does not show any willfulness or wantonness.

The law is well settled that where there is any evidence in the record fairly tending to show such gross want of care as to indicate a wilful disregard of consequences or a willingness to inflict injury, then it is a question to be determined by the jury whether or not the negligent conduct of the defendant amounted to wantonness or wilfulness. (Mantonya v. Wilbur Lumber Co., 251 Ill. App. 364; Walldren Express & Van Co. v. Krug, 291 Ill. 472; Bremer v. Lake Erie & W. R. Co., 318 Ill. 11.) And it has been consistently held that a trial court should never take a case from the jury or direct a verdict for the defendant where to do so is to determine the weight of the plaintiff's evidence; the court is limited strictly to determine whether or not there is any evidence fairly tending to prove the facts alleged. (Kinsey v. Zimmerman, 329 Ill. 75; Mirich v. T. F. Forschner Contracting Co., 312 Ill. 343.) Applying these well settled rules of law to the case at bar, we find from the undisputed evidence that defendant was thoroughly familiar with the intersection where the accident occurred; that a stop sign to the north of the intersection, with which defendant was familiar, required her to bring her automobile to a full stop before driving out into the through street where traffic had a right to proceed without stopping; that she approached this intersection at the rate of twenty-five to thirty miles an hour, notwithstanding the slippery condition of the pavement to which all the witnesses testified. This constitued a prima facie case which the jury were justified in taking into consideration together with all the evidence in determing whether or

control her car; that it skidded out into Kennville avenue, making the impact unavoidable, and although defendant's counsel was willing to concede that defendant might have been guilty of negligence, they say that the evidence, when viewed from its aspects most favorable to plaintiff, does not show any willfulness or wantonness.

The law is well settled that where there is any evidence in the record fairly tending to show such gross sort of case as to indicate a willful disregard of consequences or a willingness to inflict injury, then it is a question to be determined by the jury whether or not the negligent conduct of the defendant amounted to wantonness or willfulness. (Hartsfield v. Milburn Lumber Co., 261 Ill. App. 364; Wallstein Express & Van Co. v. Kling, 261 Ill. 472; Bennett v. Lake Erie & W. R. Co., 230 Ill. 11.) And it has been consistently held that a trial court should never take a case from the jury or direct a verdict for the defendant where to do so is to determine the weight of the plaintiff's evidence; the court is limited strictly to determine whether or not there is any evidence fairly tending to prove the facts alleged. (Kinney v. Lieberman, 320 Ill. 72; Mitchell v. U. S. Foundry Construction Co., 318 Ill. 342.) Applying these well settled rules of law to the case at bar, we find from the undisputed evidence that defendant was thoroughly familiar with the intersection where the accident occurred; that a stop sign to the north of the intersection, with which defendant was familiar, required her to bring her automobile to a full stop before driving out into the through street where traffic had a right to proceed without stopping; that she approached this intersection at the rate of twenty-five to thirty miles an hour, notwithstanding the slippery condition of the pavement to which all the witnesses testified. This constituted a prima facie case which the jury were justified in taking into consideration together with all the evidence in determining whether or

not defendant was guilty of wilful and wanton conduct. The argument that defendant tried to stop but was unable to do so because of the slippery condition of the pavement is an argument that might properly have been addressed to the jury in answering the charge of wilfulness and wantonness, but it did not justify the court in weighing the evidence and determining as a matter of law that plaintiff could not recover.

Sec. 68 of the Civil Practice act provides in effect that where the reviewing court shall be of the opinion that the trial court committed error in entering judgment notwithstanding the verdict, such court shall reverse the order unless it shall appear that there was error in the case that would have entitled a party, in whose favor the judgment notwithstanding the verdict had been entered, to a new trial if such judgment had not been entered by the trial judge. Evidently the motion for a new trial was not passed upon by the court, and it is not argued on appeal that a new trial should have been granted. We are of the opinion that the trial court erred in entering judgment notwithstanding the verdict, and therefore under sec. 68 of the Civil Practice act, the judgment of the Superior court is reversed and the cause remanded with directions that judgment be entered in favor of plaintiff on the verdict of the jury.

REVERSED AND REMANDED WITH DIRECTIONS.

Scanlan and Sullivan, JJ., concur.

not defendant was guilty of willful and wanton conduct. The argument that defendant tried to stop but was unable to do so because of the slippery condition of the pavement is an argument that might properly have been addressed to the jury in determining the degree of willfulness and wantonness, but it did not justify the court in weighing the evidence and determining as a matter of law that plaintiff could not recover.

Sec. 68 of the Civil Practice Act provides in effect that where the reviewing court shall be of the opinion that the trial court committed error in entering judgment notwithstanding the verdict, such court shall reverse the order entered, if it shall appear that there was error in the case that would have entitled a party, in whose favor the judgment notwithstanding the verdict has been entered, to a new trial if such judgment had not been entered by the trial judge. Validity the motion for a new trial was not passed upon by the court, and it is not argued on appeal that a new trial should have been granted. We are of the opinion that the trial court erred in entering judgment notwithstanding the verdict, and therefore under Sec. 68 of the Civil Practice Act, the judgment of the Superior court is reversed and the cause remanded with directions that judgment be entered in favor of plaintiff on the verdict of the jury.

REVERSED AND REMANDED WITH DIRECTIONS.

Scanlan and Murphy, JJ., concur.

39942

A. J. CANFIELD COMPANY,
a corporation,
Appellant,

v.

JOHN GLEASNER,
Appellee.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

296 I.A. 637

MR. PRESIDING JUSTICE FRIEND
DELIVERED THE OPINION OF THE COURT.

John Gleasner, defendant, who had been employed as a salesman by A. J. Canfield Company, a corporation, plaintiff, for about a year prior to 1937, entered into a written contract of employment with plaintiff in September, 1937, under which he was retained to sell beverages manufactured by plaintiff in certain specified territory within the states of Illinois and Indiana at a stipulated salary. The agreement contained a negative covenant by which defendant agreed that after the termination of his employment he would refrain from engaging in the carbonated beverage business or in the sale of any items in competition with plaintiff in the territory assigned to him for a period of one year, and the contract also provided that because of the impossibility of determining the exact amount of damage which violation of this covenant by defendant might inflict upon plaintiff, to pay the sum of $100 for each and every breach of the covenant, in the event of a breach. Defendant left plaintiff's employ approximately five weeks after the written agreement was made, and became engaged as a salesman for Paddock Club Beverages, Inc., a competitive manufacturer, within parts of the same territory that had been assigned to him while employed by plaintiff. Plaintiff thereupon filed an amended complaint in the circuit

39942

A. J. DANFIELD COMPANY,
a corporation,

appellant,

v.

JOHN GLASSMER,

appellee.

APPEAL FROM DISTRICT
COURT, COOK COUNTY.

295 I.A. 637

MR. PRESIDING JUSTICE FRIEND
DELIVERED THE OPINION OF THE COURT.

John Glassmer, defendant, who had been employed as a salesman by A. J. Danfield Company, a corporation, plaintiff, for about a year prior to 1927, entered into a written contract of employment with plaintiff in September, 1927, under which he was retained to sell beverages manufactured by plaintiff in certain specified territory within the states of Illinois and Indiana at a stipulated salary. The agreement contained a negative covenant by which defendant agreed that after the termination of his employment he would refrain from engaging in the carbonated beverage business or in the sale of any items in competition with plaintiff in the territory assigned to him for a period of one year, and the contract also provides that because of the impossibility of determining the exact amount of damage which violation of this covenant by defendant might inflict upon plaintiff, to pay the sum of $100 for each and every breach of the covenant, in the event of a breach. Defendant left plaintiff's employ approximately five weeks after the written agreement was made, and became engaged as a salesman for Reddock Club Beverages, Inc., a competitive manufacturer, within parts of the same territory that had been assigned to him while employed by plaintiff. Plaintiff thereupon filed an amended complaint in the circuit

court, alleging the contract of employment, the termination thereof, the employment of defendant by a rival concern, specific sales effected by defendant for his new employer within the prohibited territory, the doubtful financial responsibility of defendant to pay the damages specified in the agreement and other facts pertaining to the relationship of the parties. Because of the doubtful financial responsibility of defendant, plaintiff moved for a temporary injunction to restrain him from carrying out his employment with Paddock Club Beverages, Inc., and at the same time defendant filed a motion to strike the complaint. When these motions came up for hearing the chancellor denied the motion for a temporary restraining order, sustained defendant's motion to strike the amended complaint, and dismissed the same for want of equity. This appeal by plaintiff followed. No appearance or brief has been filed by defendant.

The sole questions presented are whether the amended complaint sets forth a good cause of action, and whether plaintiff was entitled to a temporary restraining order and to a hearing by the chancellor on the complaint as amended.

Inasmuch as defendant has not filed a brief in support of the judgment entered in his favor, we are unable to determine the theory upon which he seeks to justify the court's order in refusing to enter a temporary restraining order, and in dismissing the complaint for want of equity. It appears, however, that in support of his written motion to strike the complaint, certain specified grounds were set forth as follows: 1. Failure of consideration to support the promise of defendant not to compete with plaintiff for a period of one year after leaving its employ. 2. That the agreement lacks mutuality, is unilateral and unenforcible. 3. That injunction will not lie to bar defendant from rendering services to others which are not exceptional or unusual in any manner. 4. That the complaint

court, alleging the contract of employment, the termination thereof, the employment of defendant by a rival concern, specific sales effected by defendant for his new employer within the prohibited territory, the doubtful financial responsibility of defendant to pay the damages specified in the agreement and other facts pertaining to the relationship of the parties. Because of the doubtful financial responsibility of defendant, plaintiff moved for a temporary injunction to restrain him from carrying out his employment with Radcock Club Developers, Inc., and at the same time defendant filed a motion to strike the complaint. When these motions came up for hearing the chancellor denied the motion for a temporary restraining order, overruled defendant's motion to strike the amended complaint, and dismissed the case for want of equity. From appeal by plaintiff followed. No appearance of brief has been filed by defendant.

The sole questions presented are whether the amended complaint set forth a good cause of action, and whether plaintiff was entitled to a temporary restraining order and to a hearing by the chancellor on the complaint as amended.

Inasmuch as defendant has not filed a brief in support of the judgment entered in his favor, we are unable to determine the theory upon which he seeks to justify the court's order in refusing to enter a temporary restraining order, and in dismissing the complaint for want of equity. It appears, however, that in support of his written motion to strike the complaint, certain specified grounds were set forth as follows: 1. Failure of consideration to support the promise of defendant not to compete with plaintiff for a period of one year after leaving his employ. 2. That the agreement lacks mutuality, is unilateral and unenforcible. 3. That injunction will not lie to bar defendant from rendering services to others which are not exceptional or unusual in any manner. 4. That the complaint

fails to show the defendant left plaintiff's employ through any fault on his part. 5. That the duration of the written agreement is indefinite and uncertain. 6. That restraining defendant from carrying out his employment with Paddock Club Beverages, Inc., would deprive defendant of his employment and operate as a mandatory injunction, pendente lite. 7. That the damage shown is not irreparable, since the contract provides for damages in case of breach.

The law is well settled in this and other jurisdictions that courts of equity will enjoin the breach of a negative covenant on the part of one who has sold a going business and the good will thereof, to another, under an agreement not to engage in the same kind of business in competition with the vendee within a limited territory and for a reasonable length of time. (Hursen v. Gavin, 162 Ill. 377; Old Rose Distilling Co. v. Feuer, 202 Ill. App. 210; International Mutual Fire Ins. Co. v. Carrington, 241 Ill. App. 208; Southern Fire Brick Company v. Garden City Sand Co., 223 Ill. 616.) The court evidently differentiated this class of cases from actions brought by an employer to restrain an employee who had entered into a negative covenant not to engage in competition with his former employer, unless the services of the employee were of an unusual or distinctive nature. In protecting the purchaser of a well established business under a negative covenant on the part of the seller not to engage in competition with the purchaser for a limited period of time, and within a restricted territory, the courts have proceeded upon the theory that the purchaser had acquired the good will and patronage of the seller, and that it would be unlawful and improper for the latter to destroy or impair the same within a reasonable length of time by engaging in competition with him, where a negative covenant had been entered into on the part of the seller to refrain from so doing. The same theory is applicable in protecting an em-

fails to show the defendant left plaintiff's employ through any fault on his part. 5. That the duration of the written agreement is indefinite and uncertain. 6. That restraining defendant from carrying out his employment with Hadcock Bros Beverages, Inc., would deprive defendant of his employment and operate as a mandatory injunction, peculiarly irksome. 7. That the damage shown is not irreparable, since the contract provides for damages in case of breach.

The law is well settled in this and other jurisdictions that courts of equity will enjoin the breach of a negative covenant on the part of one who has sold a going business and the good will thereof, to another, under an agreement not to engage in the same kind of business in competition with the vendee within a limited territory and for a reasonable length of time. (Hansen v. Irvin, 182 Ill. 277; Old Dose Medicine Co. v. Doser, 202 Ill. App. 120; International Wood Pipe Inc. Co. v. Durkin Bros, 241 Ill. App. 208; Southern Pipe Brick Company v. Garden City Sand Co., 283 Ill. 216.) The court evidently differentiated this class of cases from actions brought by an employer to restrain an employee who had entered into a negative covenant not to engage in competition with his former employer, unless the services of the employee were of an unusual or distinctive nature. In protecting the purchaser of a well established business under a negative covenant on the part of the seller not to engage in competition with the purchaser for a limited period of time, and within a restricted territory, the courts have proceeded upon the theory that the purchaser had acquired the good will and patronage of the seller, and that it would be unlawful and improper for the latter to destroy or impair the same within a reasonable length of time by engaging in competition with him, where a negative covenant had been entered into on the part of the seller to refrain from so doing. The same theory is applicable in protecting an em-

ployer against destructive influences that may be exerted by an employee who has become familiar with the employer's customers over a period of time, and the courts have held that the same protection should therefore be afforded an employer who has entered into an agreement with his employee to refrain from engaging in competition with him within a limited period after the termination of the employment.

In Eureka Laundry Co. v. Long, 146 Wis. 205, the defendant had entered into a contract of employment for an indefinite period of time for a consideration therein named, to drive a laundry wagon for plaintiff on a specified route in the city of Milwaukee. The agreement contained a negative covenant similar to that in the case at bar. About sixteen months after the agreement was made edfendant voluntarily left the employ of the plaintiff, and suit was brought to restrain him from violating the negative covenant contained in the agreement. In discussing the propriety of a restraining order, the court propounded the inquiry, "Does it make any substantial difference whether the thing of value bargained for is contained in a contract of sale or in a contract of hiring? If it is lawful and proper to protect a business just about to be acquired from certain acts by the seller who is familiar with such business, why is it not equally lawful and proper to protect an established business from acts by one who has become familiar therewith?" The court answered the inquiries by saying that it did not perceive any difference in principle, and held that although the services of defendant were of an ordinary nature and could be performed by anyone, that nevertheless the agreement was reasonable, that defendant had undertaken not to cause the damage complained of, and that a court of equity will protect the employer's rights.

In Turner v. Abbott, 116 Tenn. 718, defendant was employed

ployer against destructive influences that may be exerted by an employee who has become familiar with the employer's customers over a period of time, and the courts have held that the same protection should therefore be afforded an employer who has entered into an agreement with his employee to refrain from engaging in competition with him within a limited period after the termination of the employment.

In Aurelia Laundry Co. v. Lunn, 116 Ala. 340, the defendant had entered into a contract of employment for an indefinite period of time for a consideration otherwise named, to drive a laundry wagon for plaintiff on a specified route in the city of Birmingham. The agreement contained a negative covenant similar to that in the case at bar. About sixteen months after the agreement was made defendant voluntarily left the employ of the plaintiff, and suit was brought to restrain him from violating the negative covenant contained in the agreement. In discussing the propriety of a restraining order, the court propounded the inquiry, "Does it make any substantial difference whether the thing of value bargained for is contained in a contract of sale or in a contract of hiring? If it is lawful and proper to protect a business just about to be acquired from certain acts by the seller who is familiar with such business, why is it not equally lawful and proper to protect an established business from acts by one who has become familiar therewith?" The court answered the inquiries by saying that it did not perceive any difference in principle, and held that although the services of defendant were of an ordinary nature and could be performed by anyone, that nevertheless the agreement was reasonable, that defendant had undertaken not to cause the damage complained of, and that a court of equity will protect the employer's rights.

In Bunner v. Abbott, 114 Tenn. 718, defendant was employed

as an assistant dentist under an oral stipulation that he would not, after the termination of his employment, engage in the practice of dentistry in competition with his employer, and the court held that the agreement was reasonable as to time and place, was not invalid as against public policy, and should be upheld and enforced.

In Wark v. Ervin Press Corporation, 48 Fed. (2d) 152, defendant had been employed as plaintiff's special sales executive under a written agreement containing a provision that if the agreement should terminate defendant would not thereafter reveal any of his employer's trade secrets and would not for five years engage in the same business or become employed by any person or corporation engaged in that business, except in certain states. It was there, as here, contended, that the agreement was unilateral because there was no agreement to engage the defendant for any specified time, but the court, overruling this contention, held that defendant should be enjoined during the five year period from retaining employment with a competitive firm or any other persons directly or indirectly engaged in the competitive business, and afforded plaintiff the protection there sought.

In Carter v. Alling, 43 Fed. 208, the court upheld an agreement between a manufacturing corporation whose business extended throughout the United States and Canada and one of its traveling salesmen who had been in its employ for several years, whereby the court restrained him from entering the service of any business competitor for three years after leaving the corporation's employment.

The law regards the good will of a particular trade as having a market value, and will protect it to a reasonable extent. (Taylor v. Blanchard, 13 Allen 370; National Enameling and Stamping Co., v. Haberman, 120 Fed. 415.) And an employer has the same right to protect his good will and business from attack by his employees through securing covenants from them prohibiting them from entering

an assistant director under an oral obligation that he would not, after the termination of his employment, engage in the practice of dentistry in competition with his employer, and the court held that the agreement was reasonable as to time and place, was not invalid as against public policy, and should be upheld and enforced.

In Lack v. Dwyer Press Corporation, 4 Ned. (2d) 1[illegible], defendant had been employed as principal's special sales executive under a written agreement containing a provision that if the agreement should terminate defendant would not thereafter reveal any of his employer's trade secrets and would not for five years engage in the same business or become employed by any person or corporation engaged in that business, except in certain states. It was shown, as court concluded, that the agreement was unlimited because there was no agreement to engage the defendant for any specified time, but the court, overruling this contention, held that defendant should be enjoined during the five year period from rendering employment with a competitive firm or any other persons directly or indirectly engaged in the competitive business, and afforded plaintiff the protection there sought.

In Carter v. Allen, 43 Ned. 206, the court upheld an agreement between a small clothing cutter firm whose business extended throughout the United States and Canada and one of its travelling salesmen who had been in its employ for several years, already the court restrained him from entering the service of any business competitor for three years after leaving the corporation's employment.

The law regards the good will of a particular trade as having a market value, and will protect it to a reasonable extent. (Taylor v. Blanchard, 13 Allen 370; National Protecting and Detecting Co. v. Roberson, 120 Ga. 1[illegible].) And an employer has the same right to protect his good will and business from attack by his employees through restraining covenants from them prohibiting them from entering

into competition with him in limited territories for reasonable periods after they leave his employ, as he would have to protect himself against competition from a former owner from whom he had acquired a covenant against engaging in the same kind of business in territory where it would be in competition with him for a reasonable time after sale, as a condition precedent to his purchasing the going business. (Eureka Laundry Co. v. Long, supra.) In Carter v. Alling, supra, the court held that "an employer has the right to bind an employee not to go into the employ of a competitor, for a reasonable time after his employment terminates, within the territory where the employer seeks his market." This doctrine was approved in International Mutual Fire Insurance Co. v. Carrington, supra, where an injunction was issued restraining an insurance solicitor and collector from engaging in a competitive business under circumstances similar to those here presented, notwithstanding the agreement with the employer in that case had been terminated and was not of any specific duration. In American Cleaners and Dyers v. Foreman, 252 Ill. App. 122, plaintiff sought to enjoin two former employees from calling on the same customers they had solicited while employed by plaintiff, but in that case no negative covenant had been entered into between the employer and the employees; nevertheless, the court inferentially pointed out that "the plaintiff did not in advance require its employees to covenant not to enter into competition upon leaving the employ; this could have been done, and probably would be enforcible."

The amended complaint in this proceeding specifically charges Gleasner with having engaged in competitive business and with the violation of the covenant on several occasions. Under the allegations of the complaint it is natural to presume that he will continue to breach it unless in some manner prevented, and under the charge that

into competition with him in limited territories for a reasonable period after they leave his employ, so as to protect himself against competition from a former employee he had acquired a covenant against competing in a certain kind of business in territory where it would be in competition with him for a reasonable time after sale, as a condition precedent to his protection in the going business. (Mercle Laundry Co. v. Lone, supra.) In Dentzer v. Allen, supra, the court held that "an employer has the right to bind an employee not to enter into the employ of a competitor, for a reasonable time after his employment terminates, within the territory where the employer seeks his market." This doctrine was approved in International Mutual Fire Insurance Co. v. Harrington, supra, where an injunction was issued restraining an insurance solicitor and collector from engaging in a competitive business under circumstances similar to those here presented, notwithstanding the agreement with the employer in that case had been terminated and was not of any specific duration. In Western Stamping and Dyers v. Lowman, 282 Ill. App. 149, plaintiff sought to enjoin two former employees from calling on the same customers they had solicited while employed by plaintiff, but in that case no restrictive covenant had been entered into between the employer and the employees; nevertheless, the court impressionably pointed out that "the plaintiff did not in advance require the employees to covenant not to enter into competition upon leaving the employ; this could have been done, and probably would be enjoinable."

The amended complaint in this proceeding specifically charges Dentzer with having engaged in competitive business and with the violation of the covenant on several occasions. Under the allegations of the complaint it is natural to presume that he will continue to breach it unless in some manner prevented, and under the charge that

defendant is of doubtful financial responsibility plaintiff was entitled to temporary relief.

We are of the opinion that the court erred in dismissing the amended complaint and in denying the motion for a temporary restraining order. The judgment of the circuit court is reversed and the cause is remanded with directions to grant a temporary injunction as prayed, to require defendant to answer within a time fixed by the court, and to proceed to a hearing on the complaint as amended and the answer thereto.

JUDGMENT REVERSED AND CAUSE REMANDED
WITH DIRECTIONS.

Scanlan and Sullivan, JJ., concur.

defendants is of doubtful financial responsibility, plaintiff was entitled to temporary relief.

We are of the opinion that the court erred in dismissing the amended complaint and in denying the motion for a temporary restraining order. The judgment of the circuit court is reversed and the cause is remanded with directions to grant a temporary injunction as prayed, to require defendant to answer within a time fixed by the court, and to proceed to a hearing on the complaint as amended and the answer thereto.

JUDGMENT REVERSED AND CAUSE REMANDED WITH DIRECTIONS.

Scanlan and Sullivan, JJ., concur.

40009

TYKO MARTINKUS and
LAWRENCE A. WEISS,
Appellants,

v.

ANTON BARTKUS,
Appellee.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

296 I.A. 637

MR. PRESIDING JUSTICE FRIEND
DELIVERED THE OPINION OF THE COURT.

On August 18, 1937, plaintiffs had judgment against defendant in the Municipal court in the sum of $195, for rental of certain premises of which plaintiffs were owners and which were occupied by defendant as a tenant. Thereafter, on November 17, 1937, on petition of defendant, the court vacated and set aside the judgment theretofore entered, and this appeal by plaintiffs followed.

The record discloses that after plaintiffs had filed their statement of claim, on August 7, 1937, the bailiff of the Municipal court, who had served summons on defendant, made the following return thereon: "Served this writ on the within named defendant, Anton Bartkus, by delivering a copy thereof to him with a Praecipe and statement of claim and affidavit attached thereto, and at the same time informing him of the contents thereof, in the City of Chicago, this 10 day of August, 1937."

After judgment had been entered, defendant, on October 26, 1937, appeared for the first time and filed his verified petition to vacate the judgment. The petition reads as follows: "Your Petitioner, Anton Bartkus, respectfully states that he is the defendant in the above entitled cause; that on the 18th day of August,

40002

CYRO MCCLURG, and
BARNEY [illegible],
Appellees,

v.

ARTHUR MARKUS,
Appellee.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

No. PRESIDING JUSTICE [illegible]
DELIVERED THE OPINION OF THE COURT.

On August 12, 1927, plaintiffs had judgment against defendant in the Municipal court in the sum of $[illegible], for rental of certain premises of which plaintiffs were owners and which were occupied by defendant as a tenant. Thereafter, on November 17, 1927, on petition of defendant, the court vacated and set aside the judgment theretofore entered, and this appeal by plaintiffs follows.

The record discloses that after plaintiffs had filed their statement of claim, on August 5, 1927, the bailiff of the Municipal court, who had served summons on defendant, made the following return thereon: "Served this writ on the within named defendant, Arthur Markus, by delivering a copy thereof to him with a message and statement of claim and affidavit attached thereto, and at the same time informing him of the contents thereof, in the city of Chicago, this 12 day of August, 1927."

After judgment had been entered, defendant, on October 20, 1927, appeared for the first time and filed his verified petition to vacate the judgment. The petition reads as follows: "Your petitioner, Arthur Markus, respectfully states that he is the defendant in the above entitled cause; that on the 12th day of August,

1937, a default judgment was taken against him in the cause herein.

"Your Petitioner further states that he is making this affidavit for the sole and limited purpose of questioning this Court's jurisdiction over his person.

"Your petitioner further states that he was not served with a copy of a writ of summons in this cause as provided by Rule 10 of the Municipal Court of Chicago, which rule provides:

"'Service of a summons may be made as follows: (1) When the party to be served is an individual, it may be made by leaving a copy thereof, together with a copy of the papers attached thereto, stamped by the clerk "a true copy", with such party personally, or, if such party have a usual place of abode, by leaving such copy, together with a copy of the papers attached thereto, at such usual place of abode with some person of the family of the age of 10 years or upwards and informing such person of the contents thereof, or, if such party maintains an office or place of business in the City of Chicago at which he carries on business and receives mail, by leaving such copy, together with a copy of the papers attached thereto, at such office or place of business with some person there employed by him as a manager, or cashier, or salesman, or saleswoman, and is of the age of 21 years or upwards, and informing such person of the contents thereof; Provided, however, that when such service is not made by personal delivery to the person to be summoned, a copy of such summons or writ, together with a copy of all papers attached thereto, is also sent by mail in a sealed envelope with postage fully paid, addressed to the party to be served at such usual place of abode or at such office or place of business, as the case may be.'

"Wherefore your petitioner prays that the default judgment heretofore entered herein be vacated and set aside and held for naught and the writ of summons herein be quashed.

"And your petitioner will ever pray."

1917, a default judgment was taken against him in the cause herein.

"Your petitioner further states that he is making this affidavit for the sole and limited purpose of questioning this court's jurisdiction over his person.

"Your petitioner further states that he was not served with a copy of a writ of summons in this cause as provided by Rule 12 of the Municipal Court of Chicago, which rule provides:

"Service of a summons may be made as follows: (1) When the party to be served is an individual, it may be made by leaving a copy thereof, together with a copy of the papers attached thereto, stamped by the clerk "a true copy", with such party personally, or, if such party have a usual place of abode, by leaving such copy, together with a copy of the papers attached thereto, at such usual place of abode with some person of the family of the age of 13 years or upwards and informing such person of the contents thereof, or, if such party maintains an office or place of business in the city of Chicago at which he carries on business and receives mail, by leaving such copy, together with a copy of the papers attached thereto, at such office or place of business with some person there employed by him as a manager, or cashier, or salesman, and is of the age of 13 years or upwards, and informing such person of the contents thereof; provided, however, that when such service is not made by personal delivery to the person to be summoned, a copy of such summons or writ, together with a copy of all papers attached thereto, is also sent by mail in a sealed envelope with postage fully paid, addressed to the party to be served at such usual place of abode or at such office or place of business, as the case may be.'

"Therefore your petitioner prays that the default judgment heretofore entered herein be vacated and set aside and held for naught and the writ of summons herein be quashed.

"And your petitioner will ever pray."

On November 17, 1937, the court granted that part of defendant's petition which prayed that the judgment entered against him be vacated, but denied his motion to quash service of summons. It must be conceded that the order of November 17, 1937, from which this appeal was prosecuted, was a final order. (Lynn v. Multhauf, 279 Ill. App. 210; Travelers Insurance Co. v. Wagner, 279 Ill. App. 13.) The petition under which the court vacated the judgment in favor of plaintiffs does not allege that defendant was not served with summons, but merely avers that he was not served "as provided by Rule 10 of the Municipal Court." It contains no denial of the indebtedness due plaintiffs for the full amount claimed by them, nor is there any allegation in the petition that defendant was unaware, on August 18, 1937, or within the term, that a judgment had been rendered against him. He does not allege that he acted diligently in moving to vacate the judgment, nor does he offer any explanation or excuse for the delay. Indeed, defendant does not even allege that he has a meritorious defense to defendants' claim, nor does he preserve the evidence adduced at the hearing, if any, upon which the court relied in vacating the judgment.

The record thus presents a situation where more than two months after judgment is rendered, the court vacated and set the same aside, notwithstanding the fact that defendant makes no claim that he has a meritorious defense to the suit, that the bailiff's return, which is made the basis of the petition, shows that defendant was personally served, and that the court, by denying the motion to quash the summons, in effect held that the service was valid.

In support of the order defendant advances but one point, namely, that sec. 21 of the municipal court act does not provide the exclusive method of vacating judgments after thirty days from

On November 17, 1927, the court granted that part of defendant's petition which prayed that the judgment entered against him be vacated, but denied his motion to quash service of summons. It must be conceded that the order of November 17, 1927, from which this appeal was prosecuted, was a final order. (Hunn v. Hufstedler, 279 Ill. App. 230; Travelers Insurance Co. v. Conner, 272 Ill. App. 18.) The petition under which the court vacated the judgment in favor of plaintiffs does not allege that defendant was not served with summons, but merely avers that he was not served "as provided by Rule 10 of the Municipal Court." It contains no denial of the indebtedness due plaintiffs for the full amount claimed by them, nor is there any allegation in the petition that defendant was unaware, on August 18, 1927, or within the term, that a judgment had been rendered against him. He does not allege that he acted diligently in moving to vacate the judgment, nor does he offer any explanation or excuse for the delay. Indeed, defendant does not even allege that he has a meritorious defense to defendants' claim, nor does he preserve the evidence adduced at the hearing, if any, upon which the court relied in vacating the judgment.

The record also presents a situation where more than two months after judgment is rendered, the court vacates and set the same aside, notwithstanding the fact that defendant makes no claim that he has a meritorious defense to the suit, that the bailiff's return, which is made the basis of the petition, shows that defendant was personally served, and that the court, by denying the motion to quash the summons, in effect held that the service was valid.

In support of the order defendant advances but one point, namely, that sec. 21 of the municipal court act does not provide the exclusive method of vacating judgments after thirty days from

the date of their entry; that judgments entered without jurisdiction of the person or subject-matter may be vacated at any time; and that the court has the power to vacate void judgments entered without jurisdiction.

Defendant's argument under this point, which assumes that the court was without jurisdiction of the person and the subject-matter, and that the judgment was void, is untenable, and no reason is advanced for the premise. Neither does the petition set forth any reason which would have justified the court in assuming that it had no jurisdiction of the defendant and the subject-matter of the controversy.

The law is well settled that after the term has passed the court will not vacate a judgment without a showing that some valid ground exists for so doing. Sec. 21 of the Municipal court act provides that every judgment, order or decree, final in its nature, shall be subject to be vacated, set aside or modified in the same manner and to the same extent as a judgment, order or decree during the term at which the same was rendered, provided a motion to vacate be entered within thirty days after the rendition thereof, and that if such motion is not made within thirty days the judgment order or decree shall not be vacated, set aside or modified excepting upon appeal or writ of error, or by bill in equity or by petition to the Municipal court setting forth ground for vacating or modifying the same, <u>which would be sufficient to cause the same to be vacated, set aside or modified by a bill in equity,</u> "provided, however, that all errors in fact in the proceedings in such case, which might have been corrected at common law by the writ of error <u>coram nobis</u> may be corrected by motion, or the judgment may be set aside, in the manner provided by law for similar cases in the circuit court." (Par. 376, sec. 21, chap. 37, p. 1035, Ill. Rev. Stats., 1937.)

the date of their entry; that judgments entered without jurisdiction of the person or subject-matter may be vacated at any time; and that the court has the power to vacate void judgments entered without jurisdiction.

Defendant's argument under this point, which assumes that the court was without jurisdiction of the person and the subject-matter, and that the judgment was void, is untenable, and no reason is advanced for the premise. Neither does the petition set forth any reason which would have justified the court in assuming that it had no jurisdiction of the defendant and the subject-matter of the controversy.

The law is well settled that after the term has passed the court will not vacate a judgment without a showing that some valid ground exists for so doing. Sec. 21 of the Municipal court act provides that every judgment, order or decree, final in its nature, shall be subject to be vacated, set aside or modified in the same manner and to the same extent as a judgment, order or decree during the term at which the same was rendered, provided a motion to vacate be entered within thirty days after the rendition thereof, and that if such motion is not made within thirty days the judgment order or decree shall not be vacated, set aside or modified except upon appeal or writ of error, or by bill in equity or by petition to the Municipal court setting forth ground for vacating or modifying the same, which would be sufficient to cause the same to be vacated, set aside or modified by a bill in equity. "Provided, however, that all errors in fact in the proceedings in such case, which might have been corrected at common law by the writ of error coram nobis may be corrected by motion, or the judgment may be set aside, in the manner provided by law for similar cases in the circuit court." (Jur. 3V6, sec. 21, chap. 37, p. 1903, Ill. Rev. Stats., 1927.)

This provision of the statute contemplates a showing, after term time, which would be sufficient to cause the judgment to be vacated, set aside or modified by bill in equity, and it has been generally held that the petition which invokes the aid of the court to set aside a judgment under those circumstances shall show that petitioner was unaware before the expiration of the term that judgment had been entered against him, that he was diligent in acting after he had notice of the judgment, and that he has a meritorious defense. (DeStafano v. Miles, 268 Ill. App. 353; Welley v. Klein, 257 Ill. App. 171.) The petition in the case at bar makes no showing as to any of these requisites, and we are therefore of the opinion that it was insufficient to confer jurisdiction upon the court to vacate the judgment, more than two months after the rendition thereof. Therefore, the order of the Municipal court, entered on November 17, 1937, vacating and setting aside the judgment should be reversed, and it is so ordered.

ORDER REVERSED.

Scanlan and Sullivan, JJ., concur.

This provision of the statute contemplates a motion, after some time, which could be sufficient to cause the judgment to be vacated, set aside or modified by still in equity, and it has been generally held that the petition which involves the aid of the court to set aside a judgment under these circumstances shall show that petitioner was unaware before the expiration of the term that judgment had been entered against him, that he was diligent in acting after he had notice of the judgment, and that he has a meritorious defense. (Dettmann v. Miles, 208 Ill., 89; 3 Bell v. Kirby, 207 Ill., 172.) The petition in the case at bar makes no showing as to any of these requisites, and we are therefore of the opinion that it was insufficient to confer jurisdiction upon the court to vacate the judgment, more than two months after the rendition thereof. Therefore, the order of the municipal court, entered on March 17, 1907, vacating and setting aside the judgment should be reversed, and it is so ordered.

ORDER REVERSED.

Freeman and Sullivan, JJ., concur.

40047

PARK LANE HOTEL COMPANY,
a corporation,
Appellee,

v.

C. H. SULLIVAN and MRS. C. H. SULLIVAN, his wife,
Appellants.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

296 I.A. 637

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

C. H. Sullivan and wife, defendants, appeal from a judgment rendered against them in the sum of $125 in favor of Park Lane Hotel Company, pursuant to a hearing in the municipal court, without a jury.

It appears from the evidence that on March 1, 1937, defendants rented two rooms in plaintiff's hotel from a Mrs. Binyon, plaintiff's agent. No written lease was entered into, but both defendants testified that they told Mrs. Binyon before occupying the rooms that they would not want them for more than sixty days because they had arranged for an apartment in another neighborhood that would be ready for occupancy at the end of that time, and that Mrs. Binyon told them this would be "perfectly agreeable." Defendants occupied the premises during March and April, 1937, and paid the rental therefor. They moved out of the premises on April 30. On May 29, 1937, plaintiff wrote a letter to Mr. C. H. Sullivan, enclosing a bill for rent from May 1 to May 15, 1937, which defendant refused to pay. Thereafter plaintiff brought suit for rental for the full month of May, 1937.

In support of the judgment plaintiff argues that a con-

tract for housing, made for an indefinite period, where the rent is payable by the month, creates a tenancy from month to month, and that such a tenancy requires a thirty-day notice for termination, and that failure to give such notice renders the tenant liable.

The evidence is scant, but both Sullivan and his wife testified positively that when they engaged the rooms in plaintiff's hotel they advised him, Binyon that they would stay there not to exceed sixty days, and would not want the rooms beyond that period, because they had arranged for an apartment in another neighborhood that would then be ready for occupancy. There is no counterveiling proof to dispute this evidence, except a letter written by Sullivan to plaintiff on June 2, 1927, upon which plaintiff relies. This letter acknowledged plaintiff's statement for rent from May 1st to May 15th, and stated that, "inasmuch as I vacated this apartment on April 30th, I am in no way obligated for this bill and do not intend to pay it." In another part of the letter Sullivan says that, "when looking at apartment in the Park Lane Apts. Binyon, who I presume is authorized to rent apartments, advised me that rentals were on a month to month basis. He told her at that time that we would probably want the apartment for sixty days, and not to exceed sixty days, and she stated that this was perfectly agreeable."

Chap. 80, sec. 6 of the statute on landlord & tenant (Ill. Rev. Stats., 1927), provides that "in all cases tenancy by the month, or for any other term less than one year, where the tenant holds over without special agreement, the landlord shall have the right to terminate the tenancy by thirty days' notice, in writing, and to maintain an action for forcible detainer or ejectment." (Italics ours.) We think this section of the statute is not applicable to the situation in this case, because the tenant had a special agreement with the landlord and did not occupy the premises after the expiration of

sixty days.

For the reasons stated the judgment of the Municipal court is reversed, and finding and judgment entered here for defendants and against plaintiff for costs.

JUDGMENT REVERSED AND JUDGMENT HERE FOR DEFENDANTS AND AGAINST PLAINTIFF FOR COSTS.

Scanlan and Sullivan, JJ., concur.

sixty days.

For the reasons stated the judgment of the municipal court is reversed, and finding and judgment entered here for defendants and against plaintiff for costs.

JUDGMENT REVERSED AND JUDGMENT THEREIN FOR DEFENDANTS AND AGAINST PLAINTIFF FOR COSTS.

Gordon and Sullivan, JJ., concur.

40094

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

v.

ERICH FRANKOWSKY,
Plaintiff in Error.

ERROR TO COUNTY COURT,
COOK COUNTY.

296 I.A. 637[4]

MR. PRESIDING JUSTICE FRIEND
DELIVERED THE OPINION OF THE COURT.

Erich Frankowsky, a licensed osteopath, was found guilty by a jury in the County court of practicing medicine by the use of drugs or medicines or operative surgery without a license, in violation of sec. 26 of the Medical Practice act of 1923, and was sentenced to serve sixty days in the county jail. He sued out a writ of error from the Supreme court, advancing the contention, among others, that the medical practice act is unconstitutional because its classification of professions is false, arbitrary, discriminatory and unscientific, and urging that osteopathy includes the use of operative surgery, antiseptics and anaesthetics, but that under the act there is no way for him to be licensed to practice osteopathy according to its tenets, including surgery, unless he also studies medicine, the use of which he does not believe in. The Supreme court in People v. Frankowsky, 368 Ill. 171, held that the validity of the Medical Practice act of 1923 had been repeatedly affirmed by it; that where a constitutional question has been determined by that court, it is no longer debatable; that the court was not required to review a prosecution under the act merely because a new argument is urged in support of an old ground of attack on the validity of the statute; and transferred the cause to this court for

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

v.

BRION FRANKOWSKY,
Plaintiff in Error.

COOK COUNTY COURT,

COOK COUNTY.

296 I.A. 637

MR. JUSTICE DUNN DELIVERED THE OPINION OF THE COURT.

Brion Frankowsky, a licensed osteopath, was found guilty by a jury in the County court of prescribing medicine by the use of drugs or medicines or operative surgery without a license, in violation of sec. 26 of the Medical Practice act of 1923, and was sentenced to serve sixty days in the county jail. He sued out a writ of error from the supreme court, advancing the contention, among others, that the medical practice act is unconstitutional because its classification of professions is false, arbitrary, discriminatory and unscientific, and urging that osteopathy includes the use of operative surgery, anaesthetics and anaesthetics, but that under the act there is no way for him to be licensed to practice osteopathy according to its tenets, including surgery, unless he also studies medicine, the use of which he does not believe in. The supreme court in People v. Frankowsky, 365 Ill. 171, held that the validity of the Medical Practice act of 1923 had been repeatedly affirmed by it; that where a constitutional question has been determined by that court, it is no longer debatable; that the court was not required to review a prosecution under the act merely because a new argument is urged in support of an old ground of attack on the validity of the statute; and transferred the cause to this court for

determination upon other questions involved.

From the evidence adduced upon the hearing in the County court, it appears that on March 4, 1937, Philip Smith, accompanied by his wife, Nettie, visited Frankowsky, a licensed osteopath, to receive treatment for a rectal ailment which Frankowsky diagnosed as two rectal fissures. After an examination, facilitated by the use of a dilator, the osteopath clipped from the lower end of the fissures two pieces of skin which obstructed drainage, then dressed the affected parts and received a payment on account of his services. He continued to treat Smith for twenty days, cleaning, sterilizing and dressing the fissures, applying heat, making tests for infection, and at various times prescribed proctologic dionol, injected an anaesthesia, also two cc's of phenol oil into the tissues of the rectum, gave Smith a tonic and some tablets, prescribed the use of powdered camphophenique, directed Mrs. Smith to purchase a rectal syringe, which was to be used for the injection of Zonite, and injected 10 cc of hydrochloric acid in 1/1000th solution in the vein of Smith's arm, which he told Smith had the property of stilumating the production of white cells. Smith failed to improve under the treatment, and was ultimately removed to a hospital. Thereafter an information was filed in the County court, which afforded the basis of this prosecution.

On his own behalf Frankowsky testified that he came to the United States in 1910, and in 1913 commenced his studies of osteopathy at the American School of Osteopathy at Kirksville, Mo.; that after spending one year there he completed his four years's course at the Chicago College of Osteopathy; that during his first year in school he studied anatomy, physiology, histology, chemistry and hygiene; during the second, third and fourth years he studied, among other things, surgery, both minor and major, and in 1915 took the examination for a license as an "other practitioner," in which he

determination upon other questions involved.

From the evidence adduced upon the hearing in the County court, it appears that on March 4, 1907, Philip Smith, accompanied by his wife, Nettie, visited Frankowsky, a licensed osteopath, to receive treatment for a rectal ailment which Frankowsky diagnosed as two rectal fissures. After an examination, facilitated by the use of a dilator, the osteopath clipped from the lower end of the fissures two pieces of skin which obstructed drainage, then dressed the affected parts and received a payment on account of his services. He continued to treat Smith for twenty days, cleaning, sterilizing and dressing the fissures, applying heat, making tests for infection, and at various times prescribed prostolorie diamol, injected on emergencies, also two cc's of phenol oil into the fissures of the rectum, gave Smith a tonic and some tablets, prescribed the use of powdered carbolphenique, directed Mrs. Smith to purchase a rectal syringe, which was to be used for the injection of tonic, and injected 10 cc of hydrochloric acid in 1\1000th solution in the vein of Smith's arm, which he told Smith had the property of stimulating the production of white cells. Smith failed to improve under the treatment, and was ultimately removed to a hospital. Thereafter an information was filed in the County court, which afforded the basis of this prosecution.

On his own behalf Frankowsky testified that he came to the United States in 1910, and in 1913 commenced his studies of osteopathy at the American School of Osteopathy at Kirksville, Mo.; that after spending one year there he completed his four years' course at the Chicago College of Osteopathy; that during his first year in school he studied anatomy, physiology, histology, chemistry and hygiene; during the second, third and fourth years he studied, among other things, surgery, both minor and major, and in 1915 took the examination for a license as an "other practitioner," in which he

was interrogated upon anatomy, physiology, chemistry, hygiene, bacteriology, histology, pathology, practice and principles; that he received an "other practitioner's" license in 1915 and held that until 1917, when he obtained an osteopathic physician's license, which he had at the time of the trial. During 1915, 1916 and 1917 Frankowsky attended surgical clinics at the Cook county hospital, and upon his graduation he applied for a license to practice osteopathy in the State of Michigan, there passed an examination and received a license, which he still holds. He practiced in Michigan for two months, then returned to Chicago and established an office on West Madison street, where he has remained in active practice for some twenty years.

Various osteopathic physicians associated with colleges of osteopathy testified in effect that the subject of surgery was taught in the school attended by Frankowsky, and that as part of the classes the use of antiseptics and anaesthetics was taught; also that the curriculum embraced courses in theory and practice, of physiology, chemistry, laboratory technique and diagnosis, histology, pathology and various other subjects. There is no serious dispute as to the course of treatment administered by Frankowsky, although his counsel argue that the prescription of the various medicines and drugs testified to by Mrs. Smith are not medicines and do not constitute a violation of the Medical Practice act. The language of the statute prohibits the use of "medicines and drugs," and in the nature of things it would be impossible for the general assembly to define all kinds of medicines and designate when and by whom they may be given and prescribed. From an examination of the record we are satisfied that the various prescriptions and injections administered to Smith constituted a violation of the act.

After the jury had returned a verdict of guilty, and a motion for a new trial was entered and had been set for hearing July 12,

are interrogated upon anatomy, physiology, chemistry, hygiene, bacteriology, histology, pathology, practice and principles; that he received an "other practitioner's" license in 1915 and held that until 1917, when he obtained an osteopathic physician's license, which he had at the time of the trial. During 1916, 1915 and 1917 Kramkowsky attended surgical clinics at the Cook county hospital, and upon his graduation he applied for a license to practice osteopathy in the state of Michigan, there passed an examination and received a license, which he still holds. He practiced in Michigan for two months, then returned to Chicago and established an office on West Madison street, where he has remained in active practice for some twenty years.

Various osteopathic physicians associated with colleges of osteopathy testified in effect that the subject of surgery was taught in the school attended by Kramkowsky, and that as part of the classes the use of antiseptics and anesthetics was taught; also that the curriculum embraced courses in theory and practice, of physiology, chemistry, laboratory examinations and diagnosis, histology, pathology and various other subjects. There is no serious dispute as to the course of treatment administered by Kramkowsky, although his counsel argue that the prescription of the various medicines and drugs testified to by Mrs. Smith are not medicines and do not constitute a violation of the medical practice act. The language of the statute prohibits the use of "medicines and drugs," and in the nature of things it would be impossible for the general assembly to define all kinds of medicines and designate when and by whom they may be given and prescribed. Upon an examination of the record we are satisfied that the various prescriptions and injections administered to Smith constituted a violation of the act.

After the jury had returned a verdict of guilty, and a motion for a new trial was entered and had been set for hearing July 12,

1937, Frankowsky's counsel raised the point that the defendant had never at any time pleaded either guilty or not guilty to the information. In support of his point there were filed the affidavits of Gerald T. Wiley and Malcolm McKerchar, associate counsel. The court refused to consider the affidavits and testimony in support thereof, and his counsel thereupon offered to prove by Frankowsky's own testimony that no such plea had been requested or offered. During the course of the colloquy between court and counsel the clerk of the court volunteered, through an unsworn statement, that before the trial he had asked whether there was a plea in the case, and that someone whom he was unable to identify or remember answered "not guilty." After considerable argument the court made the following statement:

"As far as the details are concerned, the court has no particular recollections as far as the instant case is concerned, having heard hundreds of cases within the period of time. The court does not wish to state anything with definiteness unless there is absolutely no question about it. The only thing the court clearly remembers is that before proceeding to trial, the court inquired of the clerk whether there was a plea of not guilty on file, and the clerk assured the court that there was."

The record discloses an oral plea of not guilty by defendant, and the recollection of both the judge and the clerk corroborates the record. Under the conclusions reached in People v. Archambault, 295 Ill. 266, and People v. Hubbard, 197 Ill. 15, the record imports verity and must prevail over affidavits tending to contradict it. Moreover, if Frankowsky and his counsel knew that no plea had been interposed before the trial, as they contend, they should have acted with diligence and brought their motion to the court's attention at the earliest opportunity and not have waited until after the verdict of guilty had

1951, Trankowsky's counsel raised the point that the defendant had never at any time pleaded either guilty or not guilty to the information. In support of his point there were filed the affidavits of Gerald T. Riley and Malcolm McKerchar, associate counsel. The court refused to consider the affidavits and testimony in support thereof, and his counsel thereupon offered to prove by Trankowsky's own testimony that no such plea had been requested or offered. During the course of the colloquy between court and counsel the clerk of the court volunteered, through an unsworn statement, that before the trial he had asked whether there was a plea in the case, and that someone whom he was unable to identify or remember answered "not guilty." After considerable argument the court made the following statement:

"As far as the details are concerned, the court has no particular recollection as far as the instant case is concerned, having heard hundreds of cases within the period of time. The court does not wish to state anything with definiteness unless there is absolutely no question about it. The only thing the court clearly remembers is that before proceeding to trial, the court inquired of the clerk whether there was a plea of not guilty on file, and the clerk assured the court that there was."

The record discloses no oral plea of not guilty by defendant, and the recollection of both the judge and the clerk corroborates the record. Under the circumstances recited in People v. Wolfenbuttel, 295 Ill. 326, and People v. Hubbard, 297 Ill. 11, the record imports verity and must prevail over affidavits tending to contradict it. Moreover, if Trankowsky and his counsel knew that no plea had been interposed before the trial, as they contend, they should have acted with diligence and brought their motion to the court's attention at the earliest opportunity and not have waited until after the verdict of guilty had

been returned before moving to correct the record. (McKevitt v. People, 208 Ill. 460, 466.)

It is next urged as ground for reversal that it was incumbent upon the state to prove that Frankowsky was in possession of a license to treat human ailments without the use of drugs or medicines or operative surgery. The offense charged in the information is that Frankowsky practiced the treatment of human ailments with the use of medicine, drugs and operative surgery without possessing a proper license to do so, and after introducing evidence, describing in detail the course and manner of treatment administered, the prescriptions given, and the injection of various medicines, the state rested its case. The gravamen of the contention is that it was incumbent upon the state also to prove that Frankowsky possessed a limited license, and in advancing this argument defendant endeavors to make a distinction between secs. 24, 25, 26, 28 and 29 of the Medical Practice act (chap. 91, Illinois Rev. Stats. 1937), but we find no justification under the decisions for holding that any such burden is cast upon the state. The purpose of each of these sections is to punish persons for practicing medicine without a proper license, and whether defendant in the instant case possessed a limited license is collateral to the issue. He was charged with the illegal treatment of human ailments with the use of medicine, drugs and operative surgery, without possessing a proper license, and the fact that he had a limited license would avail him nothing, even though the existence thereof had been shown; the license which he has and the existence of which he contends it was incumbent upon the state to prove, afford no defense to the charge contained in the information. In Williams v. People, 20 Ill. App. 92, 95, it was held that in the case of prosecutions on behalf of the public, license or due qualification under the statute will not be presumed, and "it rests with the defendant to prove it." In Abhau v. Grassie,

been returned before moving to correct the record. (Swavik v. People, 208 Ill. 464, 466.)

It is next urged as ground for reversal that it was incumbent upon the state to prove that Franklowsky was in possession of a license to treat human ailments without the use of drugs or medicines or operative surgery. The offense charged in the information is that Franklowsky practiced the treatment of human ailments with the use of medicine, drugs and operative surgery without possessing a proper license to do so, and after introducing evidence, describing in detail the course and manner of treatment administered, the prescriptions given, and the injection of various medicines, the state rested its case. The gravamen of the complaint is that it was incumbent upon the state also to prove that Franklowsky possessed a limited license, and in advancing this argument defendant endeavors to make a distinction between cases, id., 25, 28 and 29 of the Medical Practice act (chap. 91, Illinois Rev. Stats. 1927), but we find no justification under the decisions for holding that any such burden is cast upon the state. The purpose of each of these sections is to punish persons for practicing medicine without a proper license, and whether defendant in the instant case possessed a limited license is collateral to the issue. He was charged with the illegal treatment of human ailments with the use of medicine, drugs and operative surgery, without possessing a proper license, and the fact that he had a limited license would avail him nothing, even though the existence thereof had been shown; the license which he has and the existence of which he contends it was incumbent upon the state to prove, afford no defense to the charge contained in the information. In Williams v. People, 80 Ill. App. 92, 97, it was held that in the case of prosecutions on behalf of the public, license or due qualification under the statute will not be presumed, and "it rests with the defendant to prove it." In Dixon v. Commonwealth,

262 Ill. 636, the court said (p. 638): "It is not easy to lay down a general rule by which it may be readily determined upon which party the burden of proof will lie when a negative is averred in the pleading. Each case depends upon its own peculiar circumstances. 'Courts must apply practical sense in determining the question ***.' The weight of authority, however, is to the effect that where the question of such a license is only collaterally involved, the license will be presumed unless proof of the contrary is presented by the other party."

Frankowsky's real defense upon the hearing, and the one upon which he relied, was that under his limited license he was permitted to perform the acts with which he was charged. Therefore, proof of the existence of the limited license was merely a collateral matter.

The remaining point urged for reversal is that if the effect of the decisions in People v. Love, 298 Ill. 304, People v. Schaeffer, 310 Ill. 574, and People v. Graham, 311 Ill. 92, was not to render Frankowsky's license under the 1917 act void, their effect was to broaden the scope of the powers granted him by such license and permit him to perform the acts with which he was charged. In other words, it is argued that the Medical Practice act by its terms expressly excepts and exempts defendant's license from its regulation. Sec. 22 of the act of 1923 is cited and relied on as affording the basis for this contention. It reads as follows: "All licenses and certificates heretofore legally issued by authority of law in this State permitting the holder thereof to practice medicine, or to treat human ailments in any other manner, or to practice midwifery, and valid and in full force and effect on the taking effect of this Act, shall have the same force and effect, and be subject to the same authority of the department to revoke or suspend them as licenses issued under this Act." (Ill. Rev. Stat. 1937, chap. 91, sec. 22.)

See III. 684, the court said (p. 685): "It is not easy to lay down a general rule by which it may be readily determined upon which party the burden of proof will lie when a negative is averred in the pleading. Each case depends upon its own peculiar circumstances. 'Courts must apply practical sense in determining the question ***.' The weight of authority, however, is to the effect that where the question of such a license is only collaterally involved, the license will be presumed unless proof of the contrary is presented by the other party."

Trankowsky's real defense upon the hearing, but the one upon which he relied, was that under the limited license he was permitted to perform the acts with which he was charged. Therefore, proof of the existence of the limited license was merely a collateral matter.

The remaining point urged for reversal is that if the effect of the decisions in People v. Love, 158 III. 501, People v. Schoeffer, 210 III. 174, and People v. Lewis, 211 III. 98, was not to render Trankowsky's license under the 1917 act void, their effect was to broaden the scope of the powers granted him by such license and permit him to perform the acts with which he was charged. In other words, it is argued that the Medical Practice act by its terms expressly excepts and exempts defendants' license from its regulation. Sec. 22 of the act of 1923 is cited and relied on as affording the basis for this contention. It reads as follows: "All licenses and certificates heretofore legally issued by authority of law in this state permitting the holder thereof to practice medicine, or to treat human ailments in any other manner, it to practice midwifery, and valid and in full force and effect on the taking effect of this act, shall have the same force and effect, and be subject to the same authority of the department to revoke or suspend them as licenses issued under this act." (Ill. Rev. Stat. 1927, chap. 91, sec. 22.)

It appears to us that this section of the Medical Practice act expressly makes Frankowsky's license subject to the same authority of the department to revoke or suspend as licenses issued since the enactment of the revised statute. The Medical Practice act of 1923 is not a new act on the subject of the practice of healing of diseases. The title of the act, "An act to revise the law in relation to the practice of the treatment, etc.," discloses that fact, and all licenses issued under the act of 1917 are subject to the provisions of the revised act of 1923. It was so decided in People v. Witte, 315 Ill. 282. It should also be noted that defendant, in making this argument, seeks to stress the point that his only act in the case at bar was that of operative surgery, which he contends, under the Love, Schaefer and Graham cases he is authorized to do, but as heretofore said there was coupled with the operative surgery performed by defendant, the prescription of various medicines and drugs and the injection of medicines, which we believe clearly constitute a violation of the statute.

We find no convincing reason for reversal of the judgment of the County court, and it is therefore affirmed.

JUDGMENT AFFIRMED.

Scanlan and Sullivan, JJ., concur.

It appears to me that this section of the Medical Practice Act expressly makes Franklin's license subject to the sole authority of the department to revoke or suspend as licenses issued since the enactment of the revised statute. The Medical Practice act of 1923 is not a new act on the subject of the practice of healing of diseases. The title of the act, "An act to revise the law in relation to the practice of the treatment, etc.," discloses that fact, and all licenses issued under the act of 1919 are subject to the provisions of the revised act of 1923. It was so decided in People v. Little, 318 Ill. 382. It should also be noted that defendant, in making this argument, fails to stress the point that his only act in the case at bar was that of operative surgery, which he contends, under the Love, Schaefer and Dawson cases he is authorized to do, but as he therefore said there was coupled with the operative surgery performed by defendant, the prescription of various medicines and drugs and the injection of medicines, which we believe clearly constitute a violation of the statute.

We find no controlling reason for reversal of the judgment of the County court, and it is therefore affirmed.

JUDGMENT AFFIRMED.

Scanlan and Sullivan, JJ., concur.

40100

PEOPLE OF THE STATE OF ILLINOIS,
Appellant,

v.

JACOB KAPUSTIAK,
Appellee.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

296 I.A. 638

MR. PRESIDING JUSTICE FRIEND
DELIVERED THE OPINION OF THE COURT.

Jacob Kapustiak, defendant, was tried in the Municipal court on an information charging him with unlawfully stealing and taking away from a certain garage, located at 5047 South Damen avenue, Chicago, two Oakland heating stoves and four chairs, valued at $14, being the personal property of James I. Cihak, contrary to the statute. Defendant pleaded not guilty to the charges, and after being fully advised by the court, waived trial by jury. The court heard the testimony of witnesses and the argument of counsel, and found defendant guilty of larceny of property valued at $14. He was sentenced to the house of correction for six months and fined $1 and costs. After he had served about one month of his sentence, his petition in the nature of a writ of error coram nobis was filed in the Municipal court, and the defendant was ordered brought from the house of correction for a new trial, which was set for December 7, 1937, and bail fixed at $1,000. Defendant was again arraigned, pleaded not guilty to the charge, waived a jury trial, and after the cause was submitted to the court and witnesses heard, the court again found defendant guilty, and ordered him released on probation upon his personal recognizance in the sum of $500, without surety. The

40100

PEOPLE OF THE STATE OF ILLINOIS,
appellee,

v.

JACOB KAPUSTIAK,
appellee.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. PRESIDING JUSTICE PRIMMER
DELIVERED THE OPINION OF THE COURT.

Jacob Kapustiak, defendant, was tried in the Municipal court on an information charging him with unlawfully stealing and taking away from a certain garage, located at 5047 North Damen avenue, Chicago, two heating and cooking stoves and four chairs, valued at $14, being the personal property of James I. Olmak, contrary to the statute. Defendant pleaded not guilty to the charges, and after being fully advised by the court, waived trial by jury. The court heard the testimony of witnesses and the argument of counsel, and found defendant guilty of larceny of property valued at $14. He was sentenced to the house of correction for six months and fined $1 and costs. After he had served about one month of his sentence, his petition in the nature of a writ of error coram nobis was filed in the Municipal court, and the defendant was ordered brought from the house of correction for a new trial, which was set for December 7, 1927, and bail fixed at $1,000. Defendant was again arraigned, pleaded not guilty to the charge, waived a jury trial, and after the cause was submitted to the court and witnesses heard, the court again found defendant guilty, and ordered him released on probation upon his personal recognizance in the sum of $500, without surety. The

state appeals from the order thus entered.

The petition in the nature of a writ of error coram nobis alleged in substance that defendant was of a highly nervous and excitable temperament, has great fear of courts and court procedure, and because of this condition was rendered speechless at the first trial; that he was intoxicated to such an extent that he could not distinguish between right and wrong; that he was not represented by counsel; that he was innocent of the crime, and had a meritorious defense to the charge brought against him.

The state's attorney moved to dismiss the petition assigning some eight specific reasons therefor, but the court overruled the motion to dismiss and proceeded to a second trial of the defendant. No appearance or brief have been filed by defendant on this appeal.

We have frequently had occasion to pass upon the function and purpose of similar petitions, brought under par. 196, sec. 72, chap. 110, Illinois Revised Statutes, 1937, and have consistently held that such petitions should not be entertained unless facts are specifically stated therein showing that by the exercise of diligence the petitioner could not have been able and was not able to produce the newly discovered evidence relied upon for another hearing; that the judgment which is sought to be reviewed was based on errors of fact, which must be specifically stated and not mere conclusions, and that the newly discovered facts are such as would have prevented the rendition of the judgment had they been known at the trial. (People v. Long, 346 Ill. 646; Jacobson v. Ashkinaze, 337 Ill. 141; People v. Pangos, General No. 39661, not reported, filed February 15, 1938, by the Appellate court, first district.)

The function of the writ of error coram nobis at common law, and the statutory motion substituted for it in this state is well defined in Jacobson v. Ashkinaze, supra, where the court (at p. 146) characterized it as being a proceeding "to bring before the court

state appeals from the order that entered.

The petition in the nature of a writ of error coram nobis alleged in substance that defendant was of a highly nervous and excitable temperament, has great fear of courts and court procedure, and because of this condition was rendered speechless at the first trial; that he was intoxicated to such an extent that he could not distinguish between right and wrong; that he was not represented by counsel; that he was innocent of the crime, and had a meritorious defense to the charge brought against him.

The state's attorney moved to dismiss the petition assigning some eight specific reasons therefor, but the court overruled the motion to dismiss and proceeded to a second trial of the defendant. No appearance or brief have been filed by defendant on this appeal.

We have frequently had occasion to pass upon the function and purpose of similar petitions, brought under par. 122, sec. 72, chap. 110, Illinois Revised Statutes, 1957, and have consistently held that such petitions should not be entertained unless facts are specifically stated therein showing that by the exercise of diligence the petitioner could not have been aware and was not able to produce the newly discovered evidence relied upon for another hearing; that the judgment which is sought to be reviewed was based on errors of fact, which must be specifically stated and not mere conclusions, and that the newly discovered facts are such as would have prevented the rendition of the judgment had they been known at the trial. (People v. Lorenz, 366 Ill. 646; Jacobson v. Armstrong, 327 Ill. 121; People v. Barron, Docket No. 35023, not reported, filed February 15, 1962, by the appellate court, first district.)

The function of the writ of error coram nobis at common law, and the statutory motion substituted for it in this state is well defined in Jacobson v. Armstrong, supra, where the court (at p. 126) characterized it as being a proceeding "to bring before the court

rendering the judgment matters of fact not appearing of record, which, if known at the time the judgment was rendered, would have prevented its rendition. Illustrations of such matters are the disability of the parties to sue or defend, the failure of the clerk to file a plea or answer, and the omission to interpose, through fraud, duress or excusable mistake and without negligence on the part of the defendant, a valid defense existing in the facts in the case. The motion is not available to review questions of fact which arise upon the pleadings or to correct errors of the court upon questions of law." (Italics ours.)

In the case at bar the petition does not allege any facts which were not known to the defendant at the time of the original trial. Although he avers that he was not represented by counsel, there is no showing that he requested the court to appoint counsel or sought a delay for the purpose of seeking representation. It will be assumed, of course, that if he had requested counsel the court would have appointed an attorney to defend him or would have allowed him time within which to retain counsel of his own selection. It is obvious that the petition was fatally defective. No offer of evidence is made that could not have been made at the time of trial. He knew all of the facts alleged in the petition when he was being tried, and if he did not present them at that time it was his own carelessness and negligence.

The law is likewise well settled that the writ of error coram nobis cannot be used by the trial court to review or reverse its own judgment. In Chapman v. North American Insurance Company, 292 Ill. 179, one of the leading cases in this state, the court said (p. 185): "It is important in considering this question to keep in mind this proposition: that the trial court cannot review itself or its own judgment and correct the same either as to any question of fact found or decided by the court or as to any question of law decided by it after the term of court has ended." And in

rendering the judgment matters of fact not appearing of record, which, if known at the time the judgment was rendered, would have prevented its rendition. Illustrations of such matters are the disability of the parties to one or defend, the failure of the clerk to file a plea or answer, and the mistaken to interpose through fraud, duress or excusable mistake and without negligence on the part of the defendant, a valid defense existing in the facts in the case. The motion is not available to review questions of fact which arise upon the pleadings or to correct errors of the court upon questions of law." (Italics ours.)

In the case at bar the petition does not allege any facts which were not known to the defendant at the time of the original trial. Although he avers that he was not represented by counsel, there is no showing that he requested the court to appoint counsel or sought a delay for the purpose of seeking representation. It will be assumed, of course, that if he had requested counsel the court would have appointed an attorney to defend him or would have allowed him time within which to retain counsel of his own selection. It is obvious that the petition was fatally defective. No offer of evidence is made that could not have been made at the time of trial. He knew all of the facts alleged in the petition when he was being tried, and if he did not present them at that time it was his own carelessness and negligence.

The law in Ohio will recognize that the rule of error coram nobis cannot be used by the trial court to review or revise its own judgment. In Gibson v. North Western Insurance Company, 292 Ill. 175, one of the leading cases in this state, the court said (p. 185): "It is important in considering this question to keep in mind this proposition: that the trial court cannot review itself or its own judgment and correct the same either as to any question of fact formal or decided by the court or as to any question of law decided by it after the term of court has ended." And in

Heinsius v. Poehlmann, 232 Ill. App. 472, the court defined the purpose of the writ, as follows (p. 476): "The purpose of the writ of error coram nobis, or the motion under our statutes is not to review the errors of the trial judge but to grant relief where there is some fact in the record, which, if known to the court at the time, would have prevented the entry of the judgment."

The facts of record to which the cases refer were at common law intended to relieve against errors committed during progress of a lawsuit, such as the death of either party pending a suit and before judgment therein, or infancy, where the party was not properly represented by guardian, or coverture, where the common law disability still exists or existed at the time of the trial, or a valid defense existing in the facts of the case but which, without negligence on the part of the defendant, was not presented to the court, either through duress, fraud or excusable mistake, these facts not appearing on the face of the record and being such that if known in season would have prevented the rendition and entry of the judgment. Although the courts have enlarged upon the ancient common law purpose of the writ of error coram nobis, they have not extended it to include retrial upon facts which were available to the defendant when first tried, or to make it serve the function of a review of the court's own judgment.

In the instant case defendant had two trials, and although this appeal comes up on the common law record, no bill of exceptions having been preserved, it would appear from the petition that he was tried upon the same facts both times, and found guilty. In view of our conclusion that the petition was insufficient, the judgment order of the municipal court of December 7, 1937, discharging the defendant from the house of correction and placing him on probation, is reversed. The state's attorney should immediately take the proper steps to bring about the recommitment of defendant under the original judgment order.

JUDGMENT ORDER OF DECEMBER 7, 1937, REVERSED.

Scanlan and Sullivan, JJ., concur.

Hathaway v. Goodhumour, 298 Ill. App. 472, the court defined the purpose of the writ, as follows (p. 472). "The purpose of the writ of error coram nobis, or the motion under our statutes is not to review the errors of the trial judge but to grant relief where there is some fact in the record, which, if known to the court at the time, would have prevented the entry of the judgment." The facts of record to which the cases merely note at common law intended to relieve against errors committed during proceedings of a lawsuit, such as the death of either party pending a suit and before judgment thereon, or infancy, where the party was not properly represented by guardian, or coverture, where the common law disability still existed or existed at the time of the trial, or a valid defense existing in the facts of the case but which, without negligence on the part of the defendant, was not presented to the court, either through duress, fraud or excusable mistake, these facts not appearing on the face of the record and being such that if known in season would have prevented the rendition and entry of the judgment. Although the courts have enlarged upon the ancient common law purpose of the writ of error coram nobis, they have not extended it to include review upon facts which were available to the defendant when first tried, or to make it serve the function of a review of the court's own judgment.

In the instant case defendant had two trials, and although this appeal stems up on the common law record, no bill of exceptions having been preserved, it would appear from the petition that he was tried upon the same facts both times, and found guilty. In view of our conclusion that the petition was insufficient, the judgment order of the municipal court of December 7, 1947, discharging the defendant from the house of correction and placing him on probation, is reversed. The state's attorney should immediately take the proper steps to bring about the recommitment of defendant under the original judgment order.

JUDGMENT OF [illegible] DECEMBER 7, 1947, REVERSED.

Gordon and Sullivan, JJ., concur.

39545

LUCILLE HIRSCH, MARGARET G. HOWARD and ANN M. CONNOR,
Appellees,

v.

AUTOMATIC CANTEEN COMPANY OF AMERICA, a corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

296 I.A. 638

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This action, which was tried by the court without a jury, was brought by plaintiffs Lucille Hirsch, Margaret G. Howard and Ann M. Connor, to recover from defendant, Automatic Canteen Company of America, their employer, money which they alleged they loaned said defendant out of their salaries. The court found the issues against defendant and in favor of plaintiffs and assessed their damages at $157.50, $196.87 and $236.36, respectively. Judgments were entered upon such findings. This appeal seeks to reverse said judgments.

In their amended statement of claim each plaintiff alleged two causes of action, one for the recovery of wages claimed to have been withheld from her salary by defendant during a period of twenty-six weeks and the other for the recovery of money claimed to have been "loaned" by her to defendant at its request, said money being deducted from her salary during the same period.

Defendant's affidavit of merits denied that it was indebted to plaintiffs or either or any of them in the amount claimed or in any other amount, that it withheld from plaintiffs or any or either of them any salary or wages from June 1, 1932, to November 26, 1932,

296 I.A. 638

MARGARET G. HOWARD and ANN M. O'CONNOR,
Appellees,

v.

AUTOMATIC CARTON COMPANY OF AMERICA, a corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This action, which was tried by the court without a jury, was brought by plaintiffs Lucille Hirsch, Margaret G. Howard and Ann M. Connor, to recover from defendant, Automatic Carton Company of America, their employer, money which they alleged they loaned said defendant out of their salaries. The court found the issues against defendant and in favor of plaintiffs and assessed their damages at $127.50, $136.67 and $220.56, respectively. Judgments were entered upon such findings. This appeal seeks to reverse said judgments.

In their amended statement of claim each plaintiff alleged two causes of action, one for the recovery of wages claimed to have been withheld from her salary by defendant during a period of twenty-six weeks and the other for the recovery of money claimed to have been "loaned" by her to defendant at its request, said money being deducted from her salary during the same period.

Defendant's affidavit of merits denied that it was indebted to plaintiffs or either of any of them in the amount claimed or in any other amount, that it withheld from plaintiffs or any or either of them any salary or wages from June 1, 1932, to November 26, 1932,

the period in question, or that it borrowed any money from plaintiffs or any or either of them during said period. At the commencement of the trial plaintiffs by their attorney waived that part of the statement of claim which sought recovery on the ground of wages withheld.

In May, 1932, plaintiffs were employees of defendant and had been for sometime theretofore. Early in 1932, because of a decrease in its business and in order to conserve all the cash possible, defendant inaugurated a plan of paying 90% of the salaries of its employees, including plaintiffs, in cash and the balance of 10% in stock of the company. This method of payment resulted in the employees receiving their full salaries, although partly in stock. The payment of salaries partly in stock continued throughout 1932, but this method of payment is not involved in this controversy except incidentally.

It is undisputed that meetings of the employees of the defendant were called at which officers of the company announced plans for deducting certain amounts from such employees' salaries, but there is a sharp conflict in the evidence as to the nature of the plans announced and as to what was said concerning them. Plaintiffs and other witnesses produced by them testified that the deductions from the employees' wages, which defendant's officers announced at the various meetings the defendant was going to make, were expressly described as a series of loans from the employees, which the company agreed to pay back at a later date. The witnesses for the defendant, including the officers who spoke at the meetings, testified that the matter of a "loan" by the company from its employees of part of their salaries was never mentioned at any of the meetings; that the employees were advised at said meetings that the deductions were outright reductions in salaries; that there was neither any promise nor any intimation that the amounts deducted would ever

the period in question, or that it borrowed any money from plaintiffs or any or either of them during said period. At the commencement of the trial plaintiffs by their attorney waived that part of the statement of claim which sought recovery on the ground of mutuality.

In May, 1932, plaintiffs were employees of defendant and had been for somewhat theretofore. Early in 1932, because of a decrease in its business and in order to conserve all the cash possible, defendant inaugurated a plan of paying 10% of the salaries of its employees, including plaintiffs, in cash and the balance of 10% in stock of the company. This method of payment resulted in the employees receiving their full salaries, although partly in stock. The payment of salaries partly in stock continued throughout June 1932, but this method of payment is not involved in this controversy except incidentally.

It is undisputed that meetings of the employees of the defendant were called at which officers of the company announced plans for reducing certain amounts from such employees' salaries, but there is a sharp conflict in the evidence as to the nature of the plans announced and as to what was said concerning them. Plaintiffs and other witnesses produced by them testified that the deductions from the employees' wages, which defendant's officers announced at the various meetings the defendant was going to make, were expressly described as a series of loans from the employees, which the company agreed to pay back at a later date. The witnesses for the defendant, including the officers who spoke at the meetings, testified that the matter of a "loan" by the company from its employees of part of their salaries was never mentioned at any of the meetings; that the employees were advised at said meetings that the deductions were outright reductions in salaries; that there was neither any promise nor any intimation that the amounts deducted would ever

be paid back. Thus, the principal issue is whether or not there was a promise on the part of defendant to repay plaintiffs the amount of the deductions from their respective salaries.

Defendant's major contention is that as to this issue of fact the findings of the trial court upon which the judgments herein were entered were against the manifest weight of the evidence.

The substance of the evidence of plaintiffs and their witnesses was that in the latter part of May, 1932, the officers of defendant summoned all of its employees to a meeting where said officers advised the employees of the financial distress of the company due to the depression, and that it would in all likelihood have to close down its business altogether unless the employees would come to the rescue by loaning defendant one week's salary during each of the months of June and July, 1932, which loan would be deducted from their salaries and repaid by their employer about January 1, 1933; that deductions were made from the employees' salaries for the period of eight weeks commencing June 1, 1932, which amounted to 25% thereof; that the employees were summoned to another meeting about the end of July, 1932, at which defendant's officers declared that the company's financial condition was even more critical and announced a new plan of deductions from the employees' salaries, which deductions were to be made as loans by the employees to the employer and repaid about January 1, 1933, when business improved; that under this plan defendant proposed to deduct 50% from the weekly salary of each employee for the period of nine weeks beginning with the week ending July 30, 1932, which date was the regular pay day, and to deduct 25% of each employee's weekly salary for the next succeeding period of nine weeks, which commenced with the pay day of October 1, 1932; and that such deductions were made and the amounts so deducted from plaintiffs' salaries by way of loans have not been repaid by defendant.

be paid back. Thus, the principal issue is whether or not there was a promise on the part of defendant to repay plaintiffs the amount of the deductions from their respective salaries.

Defendant's major contention is that as to this issue of fact the findings of the trial court upon which the judgments herein were entered were against the manifest weight of the evidence.

The substance of the evidence of plaintiffs and their witnesses was that in the latter part of May, 1932, the officers of defendant summoned all of its employees to a meeting where said officers advised the employees of the financial distress of the company due to the depression, and that it would in all likelihood have to close down its business altogether unless the employees would come to the rescue by loaning defendant one week's salary during each of the months of June and July, 1932, which loan would be deducted from their salaries and repaid by their employer about January 1, 1933; that deductions were made from the employees' salaries for the period of eight weeks commencing June 1, 1932, which amounted to 15% thereof; that the employees were summoned to another meeting about the end of July, 1932, at which defendant's officers declared that the company's financial condition was even more critical and announced a new plan of deductions from the employees' salaries, which deductions were to be made as loans by the employees to the employer and repaid about January 1, 1933, when business improved; that under this plan defendant proposed to deduct 30% from the weekly salary of each employee for the period of nine weeks beginning with the week ending July 30, 1932, which date was the regular pay day, and to deduct 15% of each employee's weekly salary for the next succeeding period of nine weeks, which commenced with the pay day of October 1, 1932; and that such deductions were made and the amounts so deducted from plaintiffs' salaries by way of loans have not been repaid by defendant.

The testimony of defendant's witnesses, supported in many respects by the testimony of plaintiffs and some of their witnesses, was substantially that two meetings of the employees were called by defendant's officers, one in the last week of May, 1932, and the other in the last week of July, 1932; that at the first meeting it was explained that because of the prevailing unfavorable business conditions it was necessary to either reduce the number of employees or to reduce the salaries of all employees 25% for eight weeks commencing June 1, 1932, so that all might be continued in its employment; that 25% was deducted from each employee's salary for the period of eight weeks ending July 23, 1932; that at the second meeting in the last week of July, it was pointed out to the employees that business conditions had become worse instead of better and that a new plan of salary reductions would have to be put into effect, that under this plan each employee would suffer a reduction of 50% of his or her weekly salary for the period of nine weeks commencing with the pay day on July 30, 1932, a 25% reduction for the period of five weeks immediately following said period of nine weeks, and that for the nine weeks next succeeding such period of five weeks, the employees were to be restored to their full salaries; that the salaries were reduced to the extent and for the periods above indicated; that full weekly salaries were restored to all the employees, including plaintiffs, beginning with the pay day on November 5, 1932, and continuously paid until the pay day of December 3, 1932, when they were paid 40% in stock of the defendant company and 60% in cash, which method of payment continued until December 31, 1932; that the question of a "loan" from the employees to defendant was never mentioned at any of the meetings; that the deductions were simply reductions in salaries; and that there was no promise of any kind that the amounts deducted from the weekly salaries of plaintiffs or the other employees would ever be repaid.

Prior to June 1, 1932, the salaries of plaintiffs were,

The testimony of defendant's witnesses, supported in many respects by the testimony of plaintiffs and none of their witnesses, was substantially that two meetings of the employees were called by defendant's officers, one in the last week of May, 1932, and the other in the last week of July, 1932; that at the first meeting it was explained that because of the prevailing unfavorable business conditions it was necessary to either reduce the number of employees or to reduce the salaries of all employees 25% for eight weeks commencing June 1, 1932, so that all might be continued in the employment; that 25% was deducted from each employee's salary for the period of eight weeks ending July 23, 1932; that at the second meeting in the last week of July, it was pointed out to the employees that business conditions had become worse instead of better and that a new plan of salary reductions would have to be put into effect, that under this plan each employee would suffer a reduction of 50% of his or her weekly salary for the period of nine weeks commencing with the pay day on July 30, 1932, a 25% reduction for the period of five weeks immediately following said period of nine weeks, and that for the nine weeks next succeeding such period of five weeks, the employees were to be restored to their full salaries; that the salaries were reduced to the extent and for the periods above indicated; that full weekly salaries were restored to all the employees, including plaintiff, beginning with the pay day on November 1, 1932, and continuously paid until the pay day of December 1, 1932, when they were paid 40% in scrip of the defendant company and 60% in cash, which method of payment continued until December 31, 1932; that the question of a "loan" from the employees to defendant was never mentioned in any of the meetings; that the deductions were simply reductions in salaries; and that there was no promise of any kind that the amounts deducted from the weekly salaries of plaintiffs or the other employees would ever be repaid.

Prior to June 1, 1932, the salaries of plaintiffs were,

respectively, Lucille Hirsch $20 a week, Margaret G. Howard $25 a week and Ann M. Connor $30 a week, from which there was a deduction of 10%, representing payments by plaintiffs to that extent on the purchase of stock in the defendant company. The amount of such stock payments remained static during the period involved in plaintiffs' claim, and, as heretofore stated there is no controversy regarding same. The deductions from plaintiffs' salaries were all based on 90% thereof, that is, said salaries less the 10% stock payment.

Plaintiffs' claims, therefore, briefly summarized, are for the repayment of loans purported to have been made by them to defendant of 25% of their salaries for the eight weeks ending July 23, 1932, of 50% of their salaries for the nine weeks ending September 24, 1932, and of 25% of their salaries for the nine weeks ending November 25, 1932.

Defendant's position is that it borrowed no money from plaintiffs but reduced their salaries 25% for the eight weeks ending July 23, 1932, gave them a further salary reduction of 50% for the succeeding nine weeks ending September 24, 1932, decreased the amount of the reduction to 25% for the next five weeks ending October 29, 1932, and then restored their full salaries to them for the remaining nine weeks of the year.

It is impossible within the compass of this opinion to attempt a detailed analysis of the testimony of plaintiffs. However, after a careful and complete examination of same, it must be said that the testimony of each of them was not only confused but that it was replete with contradictions and misstatements as to the amounts of salary paid them for many of the weeks included in the period during which they claim the deductions constituted loans. After all three plaintiffs had testified that deductions were made from their salaries

respectively, Lucille Minsch $20 a week, Margaret L. Conard $20 a week and Ann M. Conner $30 a week, from which there was a deduction of 10%, representing payments by plaintiffs to that account on the purchase of stock in the defendant company. The amount of such stock currently remained static during the period involved in plaintiffs' claim, and, as hereinbefore stated there is no controversy regarding same. The deductions from plaintiffs' salaries were all based on 90% thereof, that is, said salaries less the 10% stock payment.

Plaintiffs' claims, therefore, briefly summarized, are for the repayment of sums purported to have been made by them to defendant of 20% of their salaries for the eight weeks ending July 23, 1932, of 40% of their salaries for the nine weeks ending September 24, 1932, and of 20% of their salaries for the nine weeks ending November 26, 1932.

Defendant's position is that it borrowed no money from plaintiffs but reduced their salaries 20% for the eight weeks ending July 23, 1932, gave them a further salary reduction of 50% for the succeeding nine weeks ending September 24, 1932, decreased the amount of the reduction to 20% for the next five weeks ending October 29, 1932, and then restored their full salaries to them for the remaining nine weeks of the year.

It is impossible within the compass of this opinion to attempt a detailed analysis of the testimony of plaintiffs. However, after a careful and complete examination of same, it must be said that the testimony of each of them was not only confused but that it was replete with contradictions and misstatements as to the amounts of salary paid them for many of the weeks included in the period during which they claim the deductions constituted loans. After all three plaintiffs had testified that deductions were made from their salaries

on the four weekly pay days in November, 1932, one of them, Ann M. Connor, who was employed as an assistant bookkeeper by defendant and in charge of its pay roll records during 1932, was compelled when confronted with such records to admit that she and her coplaintiffs received their full salaries for said four weeks in November, 1932, and that she personally paid same.

That one of the plaintiffs, Margaret G. Howard, was confused and inconsistent in her testimony was admitted by plaintiffs' attorney in his statement to the court: "Well this second witness here, judge, she go it all bawled up." Regardless, however, of how much confused plaintiffs were as to certain phases of their testimony and regardless of the fact that much of their testimony was inconsistent and contradictory, all three of them, as well as some of their witnesses, testified that defendant's officers expressly stated at the meetings that the deductions from the employees' salaries were to be made as loans and were to be repaid.

As heretofore shown, defendant's officers and the other witnesses called in its behalf denied in their testimony that the matter of a loan or loans from its employees of any portion of their salaries to the company, was ever considered or mentioned at any of the meetings and said officers testified positively that they told the employees that the deductions from their salaries were to be outright reductions. The testimony of defendant's witnesses in this regard was corroborated by its pay roll book covering the entire year 1932, the entries in which were made by plaintiff Ann M. Connor at the time of the transactions recorded and in the regular course of business. In our opinion this pay roll book completely refutes plaintiffs' theory and evidence to the effect that defendant borrowed from them the amounts represented by the deductions from their salaries.

After stating that as assistant bookkeeper she handled the pay roll and kept the pay roll book of all the employees in the

on the four weekly pay days in November, 1932, one of them, Ann M. Connor, who was employed as an assistant bookkeeper by defendant and in charge of its pay roll records during June 1932, was compelled when confronted with such records to admit that she and her co-plaintiffs received their full salaries for said four weeks in November, 1932, and that she personally paid same.

That one of the plaintiffs, Margaret C. Howard, was confused and inconsistent in her testimony was admitted by plaintiffs' attorney in his statement to the court: "Only this second witness here, judge, she got it all mixed up." Regardless, however, of how much confused plaintiffs were as to certain phases of their testimony and regardless of the fact that much of their testimony was inconsistent and contradictory, all three of them, or with as some of their witnesses, testified that defendant's officers expressly stated to the meetings that the deductions from the employees' salaries were to be made as loans and were to be repaid.

As heretofore shown, defendant's officers and the other witnesses called in its behalf denied in their testimony that the matter of a loan or loans from its employees of any portion of their salaries to the company, was ever considered or mentioned at any of the meetings and said officers testified positively that they told the employees that the deductions from their salaries were to be outright reductions. The testimony of defendant's witnesses in this regard was corroborated by its pay roll book covering the entire year 1932, the entries in which were made by plaintiff Ann M. Connor at the time of the transactions recorded and in the regular course of business. In our opinion this pay roll book completely refutes plaintiffs' theory and evidence to the effect that defendant borrowed from them the amounts represented by the deductions from their salaries.

After stating that as assistant bookkeeper she handled the pay roll and kept the pay roll book of all the employees in the

office of defendant, plaintiff Connor testified that in making the entries in such books "she showed the full amount of the salary *** and we showed the 10% stock reduction, then the net salary to each employee *** we had a stock record book which showed the balance of each employee paid on this stock account;" that if there were any salary accruals, either cash or in stock, she would enter same in her book so they would balance up; that opposite the employees' names on each sheet of the pay roll book she entered "full salary" or "the total amount of salaries due employees" in a column under the heading "Total Amount," the stock deduction (the amount credited weekly to each employee's stock account) in the column under the heading "Paid on Account" and the net salary paid in the column under the heading "Amount Due." The pages from defendant's pay roll book containing all entries concerning plaintiffs' salaries for the period commencing with the weekly pay day on June 4, 1932, and ending with the weekly pay day on December 31, 1932, are in evidence. These pay roll records, as already stated, support defendant's position and corroborate defendant's witnesses as to the amounts and periods of the various salary deductions. They contain no reference of any kind to loans made by employees to defendant.

Plaintiffs received no note or notes or other written memorandum of the claimed loans and no money having been actually turned over to defendant by plaintiffs, if there were any loan transactions they could only have been evidenced by a series of bookkeeping entries on defendant's books pertaining to the employees salaries. Deductions from such salaries for a loan or for any other purpose would necessarily have been reflected in the pay roll book, which was admittedly kept by the plaintiff Connor. She testified that the pages from the pay roll book in evidence showed the entire pay roll account of every employee and that it was complete in every detail.

Plaintiffs' attorney strenuously objected in the trial court

office of defendant, plaintiff Conner testified that in making the entries in such books "she (meaning the full amount of the salary *** and we showed the 10% stock reduction, then she met salary to each employee *** we had a stock record book which showed the balance of each employee paid on this stock account;" that if there were any salary accruals, either cash or in stock, she would enter same in her book so they would balance up; that opposite the employees' names on each sheet of the pay roll book she entered "full salary" or "the total amount of salaries due employees" in a column under the heading "Total amount," the stock deduction (the amount credited weekly to each employee's stock account) in the column under the heading "Paid on account" and the net salary paid in the column under the heading "Amount due." The payee from defendant's pay roll book corresponding with entries showing plaintiffs' salaries for the periods commencing with the weekly pay day on June 4, 1932, and ending with the weekly pay day on December 31, 1932, are in evidence. These pay roll records, as already stated, support defendant's position and corroborate defendant's witnesses as to the amounts and periods of the various salary reductions. They contain no references of any kind to loans made by employees to defendant.

Plaintiffs received no note or notes or other written acknowledgment of the alleged loans and no money having been actually turned over to defendant by plaintiffs, if there were any loan transactions they could only have been evidenced by a series of bookkeeping entries on defendant's books pertaining to the employees' salaries. Deductions from such salaries for a loan or for any other purpose would necessarily have been reflected in the pay roll book, which was admittedly kept by the plaintiff Conner. She testified that the pages from the pay roll book in evidence show the entire pay roll account of every employee and that it was complete in every detail.

Plaintiffs' attorney strenuously objected in the trial court

to the admission in evidence of defendant's pay roll book and just as strenuously insists here that the admission of such book constituted prejudicial error. No claim is or could be made that the pay roll book does not speak the truth. Plaintiff Connor testified that it does and her coplaintiffs were forced to admit when confronted with this documentary evidence that they had made absolute misstatements in their testimony. The persistent efforts of plaintiffs' attorney to exclude the pay roll book are easily understood when it is considered that such book in itself conclusively refutes plaintiffs' claims.

The pay roll book was clearly admissible. It was a book of account between defendant and plaintiffs in so far as the salaries of the latter were concerned. It showed the total amount of salary due each employee each week, the method of payment of same, partly in cash and partly by credit for stock, and the fact that it was paid in full. The "total amount of salary" was thus a charge against the defendant or a credit in favor of the employee. As in any account book the amount of stock credited and cash paid were credits in favor of defendant and charges against the employee. We are constrained to hold that defendant's pay roll book constituted a "book of account" within the contemplation of sec. 3 of the Evidence and Depositions act (Ill. Rev. Stats. 1937, ch. 51, par. 3, sec. 3), which provides in part as follows:

> "Where in any civil action, suit or proceeding, the claim or defense is founded on a book account, any party or interested person may testify to his account book, and the items therein contained; that the same is a book of original entries, and that the entries therein were made by himself, and are true and just; *** and thereupon the said account book and entries shall be admitted as evidence in the cause."

The record discloses that all of the requirements for the admissibility of the pay roll book were met. All of the necessary suppletory proof was properly made by plaintiff Connor, whose duty it was to keep this book. From the portions of her testimony heretofore

to the admission in evidence of defendant's pay roll book and just as strenuously insists here that the admission of such book constituted prejudicial error. No claim is or could be made that the pay roll book does not speak the truth. Plaintiff Connor testified that it does and her co-plaintiffs were forced to admit when confronted with this documentary evidence that they had made absolute contradictory statements in their testimony. The persistent efforts of plaintiffs [illegible] to exclude the pay roll book are easily understood when it is considered that such book in itself conclusively refutes plaintiffs' claims.

The pay roll book was clearly admissible. It was a book of account between defendant and plaintiffs in so far as the salaries of the latter were concerned. It showed the total amount of salary due each employee each week, the method of payment of wages, partly in cash and partly by credit for stock, and the fact that it was paid in full. The "total amount of salary" was thus a charge against the defendant or a credit in favor of the employee. As in any account book the amount of stock credited and cash paid were credits in favor of defendant and charges against the employee. We are constrained to hold that defendant's pay roll book constituted a "book of account" within the contemplation of sec. 3 of the Evidence and Depositions act (Ill. Rev. Stats. 1937, ch. 51, par. 7, sec. 3), which provides in part as follows:

> "Where in any civil action, suit or proceeding, the claim or defense is founded on a book account, any party or interested person may identify as his account book, any items therein contained; that the same is a book of original entries, and that the entries therein were made by himself, and are true and just; *** and thereupon the said account book and entries shall be admitted as evidence in the cause."

The record discloses that all of the requirements for the admissibility of the pay roll book were met. All of the necessary auxiliary proof was properly made by plaintiff Connor, whose duty it was to keep this book. From the portions of her testimony heretofore

set forth, it is clear that the pay roll book is a book of original entry kept by her in the regular course of her employment in her own handwriting, that the entries therein were made at the time of the transactions recorded and that they correctly set forth the facts. In MacNeil on Illinois Evidence, 2d ed., vol. 1, sec. 1, the author says, p. 423: "A book, to be admissible in evidence, as an account book, must contain entries or transactions as they occurred in the regular course of business *** And should have been fairly and honestly kept *** Must be book of original entry *** And made at time of transaction." We repeat that the pay roll book being a book of account between defendant and its employees and the necessary suppletory proof having been made, was properly admitted in evidence by the trial court.

It is somewhat significant that, although plaintiffs continued in defendant's employment for considerable periods after January 1, 1933, when they claim the "loans" were to be repaid, not one of them requested or demanded their repayment from any one in authority in the defendant company. It is likewise significant that when plaintiffs instituted this proceeding on March 27, 1935, they made no claim that they loaned defendant the amounts deducted from their salaries.

The trial judge prefaced his decision of this cause with an oral opinion, in which, after referring to the complexity of defendant's plan or plans of reducing its employees' salaries, he said in part: "This percentage business and how it was carried on, there is some conflict. It is impossible for the court to analyze and understand it thoroughly and it didn't understand it thoroughly ***. The people that brought about this involved and complex plan are the employers. There is nothing difficult about going to an employee and saying: 'Your wages are cut. You will get so much money. You can go to work for it or quit, just as you want to.' Under the circumstances they brought about this confusion, and as a matter of equity

set forth, it is clear that the pay roll book is a book of original entry kept by her in the regular course of her employment in her own handwriting, that the entries therein were made at the time of the transactions recorded and that they correctly set forth the facts. In Mackell on Illinois Evidence, 3d ed., vol. I, sec. 1, the author says, p. 4[illegible]: "A book, to be admissible in evidence, as an account book, must contain entries or transactions as they occurred in the regular course of business *** and should have been fairly and honestly kept *** Must be book of original entry *** and made at time of transaction." We respect that the pay roll book being a book of account between defendant and its employees and the necessary supplementary proof having been made, was properly admitted in evidence by the trial court.

It is contended by appellant that, although plaintiffs continued in defendant's employment for considerable periods after January 1, 1922, when they claim the "loans" were to be repaid, not one of them requested or demanded their repayment from any one in authority in the defendant company. It is likewise significant that when plaintiffs instituted this proceeding on March 27, 1925, they made no claim that they loaned defendant the amounts deducted from their salaries.

The trial judge prefaced his decision of this cause with an oral opinion, in which, after referring to the complexity of defendant's plan or plans of remuneration its employees, he said in part: "This protracted business and for it was carried on, there is some conflict. It is impossible for the court to analyze and understand it thoroughly and it didn't understand it thoroughly ***. The people that brought about this involved and complex plan are the employers. There is nothing sufficient about going to an employee and saying: 'Your wages are out. You will get no more money. You can go to work for it or quit, just as you want to.' Under the circumstances they brought about this contention, and as a matter of equity

and conscience, therefore, the employees are entitled to the benefit of the confusion for anything coming to them, resulting in whether they can recover or not *** recover concerning their wages."

From the foregoing statement of the trial judge it appears that he was confused as to the issues of fact involved and that he did not have that thorough understanding of the theories of the parties or of the evidence presented in support of such theories necessary to enable him to decide the case properly.

After a careful examination and consideration of all the evidence in the record we are of the opinion that the findings of the court, upon which the judgments in favor of the respective plaintiffs were entered, were against the manifest weight of the evidence and that it was conclusively shown that there were no loans made by plaintiffs to their employer but rather that their employer reduced their salaries to the extent of the amounts of the deductions from what had theretofore been their full salaries.

Other grounds are urged for reversal, but in the view we take of this cause we deem it unnecessary to discuss them.

For the reasons stated herein the judgments of the Municipal court are reversed and judgment is entered here in favor of defendant and against plaintiffs.

REVERSED AND JUDGMENT HERE IN FAVOR
OF DEFENDANT AND AGAINST PLAINTIFFS.

Friend, P. J., and Scanlan, J., concur.

and conscience, therefore, the employees are entitled to the benefit of the conclusion for anything owing to them, resulting in whatever they can recover or not for recovery concerning their wages."

From the foregoing statement of the trial judge it appears that he was confused as to the issues of fact involved and that he did not have that thorough understanding of the theories of the parties or of the evidence presented in support of such theories necessary to enable him to decide the case rightly.

After a careful examination and consideration of all the evidence in the record we are of the opinion that the findings of the court, upon which the judgments in favor of the respective plaintiffs were entered, were against the manifest weight of the evidence and that it was conclusively shown that there were no loans made by plaintiffs to their employer but rather that their employer reduced their salaries to the amount of the amounts of the deductions from what had therefore been their full salaries.

Other grounds are urged for reversal, but in the view we take of this cause we deem it unnecessary to discuss them.

For the reasons stated herein the judgments of the municipal court are reversed and judgment is entered here in favor of defendant and against plaintiffs.

REVERSED AND JUDGMENT ENTERED IN LAWSON
OF MUNICIPAL COURT FOR PLAINTIFFS.

Friend, P. J., and Scanlan, J., concur.

39577

EDISON CONSTRUCTION CO.,
a corporation,
Appellee,

v.

STANLEY KURZEJA and VICTORIA
KURZEJA,
Appellants.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

296 I.A. 638

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

On August 31, 1936, plaintiff, Edison Construction Co., procured a judgment by confession for $312.40 against defendants Stanley Kurzeja and Victoria Kurzeja, his wife, on a construction contract executed July 14, 1936, which included therein a warrant of attorney. In response to defendants' petition of September 24, 1936, to vacate said judgment, the court on that date ordered that the judgment be opened, that leave be granted to defendants to defend, that a trial of the cause be had notwithstanding said judgment, and that the judgment stand as security and the execution stayed. It was then also ordered that defendants be allowed additional time to file their affidavit of merits, which was filed October 14, 1936. The cause having been continued for hearing to December 1, 1936, it was again continued on the latter date to February 5, 1937, when, on plaintiff's motion, the court ordered defendants' affidavit of merits stricken and defendants' motion to vacate the judgment by confession overruled. February 19, 1937, defendants moved that the order of February 5, 1937, be vacated, that they be granted leave to file an amended affidavit of merits and that the case be set for trial. Defendants' last mentioned motion was ordered entered and then continued several times, the

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MADISON CONSTRUCTION CO.,
a corporation,
Appellee,

v.

STANLEY KURZETA and VICTORIA
KURZETA,
Appellants.

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

On August 31, 1936, plaintiff, Madison Construction Co., procured a judgment by confession for $312.40 against defendants Stanley Kurzeta and Victoria Kurzeta, his wife, on a construction contract executed July 14, 1936, which included therein a warrant of attorney. In response to defendants' petition of September 24, 1936, to vacate said judgment, the court on that date ordered that the judgment be opened, that leave be granted to defendants to defend, that a trial of the cause be had notwithstanding said judgment, and that the judgment stand as security and the execution stayed. It was then also ordered that defendants be allowed additional time to file their affidavit of merits, which was filed October 14, 1936. The cause having been continued for hearing to December 1, 1936, it was again continued on the latter date to February 8, 1937, when, on plaintiff's motion, the court ordered defendants' affidavit of merits stricken and defendants' motion to vacate the judgment by confession overruled. February 19, 1937, defendants moved that the order of February 8, 1937, be vacated, that they be granted leave to file an amended affidavit of merits and that the case be set for trial. Defendants' last mentioned motion was ordered entered and then continued several times, the

last postponement thereof being until March 24, 1937. In the meantime, however, on March 22, 1937, the following order was entered: "This cause coming on for hearing on motion of the defendants heretofore entered herein to vacate and set aside the order of February 5th, 1937, and the Court being fully advised in the premises, overrules said motion. It is ordered by the Court that leave be and the same is hereby given defendants to file amended affidavit of merits instanter." Pursuant to the leave granted by this order defendants filed an amended affidavit of merits on March 22, 1937, apparently after the case had been disposed of. Defendants' appeal is brought to reverse the order of February 5, 1937, striking their original affidavit of merits and overruling their motion to vacate the judgment by confession, as well as the order of March 22, 1937, denying their motion to vacate the order of February 5, 1937.

The only question presented for our determination is whether defendants were entitled to a trial on either of the affidavits of merits they were granted leave to file.

A salesman of plaintiff negotiated with defendants a contract, under the terms of which plaintiff undertook to furnish the labor and materials necessary to complete the specified alterations on defendants' building at an agreed price of $1,063.50. The contract provided that $63.50 was to be paid upon the completion of the work and the only provision therein as to how the remainder of the contract price was to be paid was that "the balance of *** $1,000 and F. H. A. interest to be paid in _____ *** equal consecutive monthly installments of _____ *** Dollars, *** to be evidenced by judgment note or notes to be delivered upon completion of work." The alterations plaintiff undertook to make on defendants' building were never even started. No payments were made by the defendants nor did

last postponement thereof being until March 24, 1927. In the meantime, however, on March 22, 1927, the following order was entered: "This cause coming on for hearing on motion of the defendants heretofore entered herein to vacate and set aside the order of February 5th, 1927, and the Court being fully advised in the premises, overrules said motion. It is ordered by the Court that leave be and the same is hereby given defendants to file amended affidavit of merits instanter." Pursuant to the leave granted by this order defendants filed an amended affidavit of merits on March 22, 1927, apparently after the case had been disposed of. Defendants' appeal is brought to reverse the order of February 5, 1927, striking their original affidavit of merits and overruling their motion to vacate the judgment by confession, as well as the order of March 22, 1927, denying their motion to vacate the order of February 5, 1927.

The only question presented for our determination is whether defendants were entitled to a trial on either of the affidavits of merits they were granted leave to file.

A salesman of plaintiff negotiated with defendants a contract, under the terms of which plaintiff undertook to furnish the labor and materials necessary to complete the specified alterations on defendants' building at an agreed price of $1,088.50. The contract provided that $68.50 was to be paid upon the completion of the work and the only provision therein as to how the remainder of the contract price was to be paid was that "the balance of ** $1,020 and N. A. interest to be paid in _____ ** equal consecutive monthly installments of _____ ** Dollars, ** to be evidenced by judgment note or notes to be delivered upon completion of work." The alterations plaintiff undertook to make on defendants' building were never even started. No payments were made by the defendants nor did

they execute the note or notes specified in the above provision of the contract. Without such note or notes and solely on the contract itself plaintiff had the judgment by confession entered, as heretofore shown, on August 31, 1936.

Plaintiff in its brief concedes in effect that the alterations to defendants' building were to be financed with a Federal loan of some kind. A letter written by plaintiff to defendants August 6, 1936, which by agreement of the parties upon oral argument was made part of the record, contains this statement: "Our understanding of the matter is that this contract was signed in good faith on your part, with the understanding that the work was to be financed by Federal funds in such a manner as to extend the payments over a period of years and making the monthly installments of principal and interest combined, amount to $10.00."

Defendants original affidavit of merits filed October 14, 1936, contained the following averments:

"Victoria Kurzeja, makes oath and says that she is one of the defendants in the above entitled cause and she verily believes that the defendants have a good defense to this suit, upon the merits, to the whole of the plaintiff's demand.

"Affiant further states that the defense of the defendant to said suit is as follows:

"These defendants and each of them deny that they are indebted to the plaintiff in the sum of Three Hundred and Twelve Dollars and Forty Cents ($312.40), or in any other sum of money whatsoever.

"These defendants and each of them, for further defense state as follows: That they admit that on the 14th day of July, 1936, they entered into a contract in writing with the plaintiff through its agent or servant, one R. H. Battey; that they admit that under the terms of the contract the plaintiff undertook to do certain work, and to furnish labor and materials for premises at 1740 West 21st Street, Chicago, and that the defendants undertook to pay therefor the sum of $1,063.50, in the manner as follows: the sum of $63.50 on completion of said work, and the balance to be financed by Federal Housing Loan; that said Federal Housing Loan was never obtained, although the defendants were at all times willing to obtain the same, made efforts to do so, although plaintiff undertook to arrange the same, and were unable to finance the said work, as a consequence of which the work contracted for was never started; that the plaintiff never complied with the said contract by completing or even undertaking the said work."

they execute the note or notes specified in the above provision of the contract. Without such note or notes and solely on the contract itself plaintiff had the judgment by confession entered, as heretofore shown, on August 31, 1926.

Plaintiff in its brief concedes in effect that the alterations to defendants' building were to be financed with a Federal loan of some kind. A letter written by plaintiff to defendants August 6, 1926, which by agreement of the parties upon oral argument was made part of the record, contains this statement: "Our understanding of the matter is that this contract was signed in good faith on your part, with the understanding that the work was to be financed by Federal funds in such a manner as to extend the payments over a period of years and making the monthly installments of principal and interest combined, amount to $10.00."

Defendants original affidavit of merits filed October 14, 1926, contained the following averments:

"Victoria Murcek, makes oath and says that she is one of the defendants in the above entitled cause and she verily believes that the defendants have a good defense to this suit, upon the merits, to the whole of the plaintiff's demand.

"Affiant further states that the defense of the defendant to said suit is as follows:

"These defendants and each of them deny that they are indebted to the plaintiff in the sum of three hundred and twelve dollars and forty cents ($312.40), or in any other sum of money whatsoever.

"These defendants and each of them, for further defense states as follows: That they submit that on the 14th day of July, 1926, they entered into a contract in writing with the plaintiff through its agent or servant, one A. H. Bailey; that they submit that under the terms of the contract the plaintiff undertook to do certain work, and to furnish labor and materials for premises at 1740 West 47th Street, Chicago, and that the defendants undertook to pay therefor the sum of $1,066.00, in the manner as follows: the sum of $[illegible] on completion of said work, and the balance to be financed by Federal Housing Loan; that said Federal Housing Loan was never obtained, although the defendants were at all times willing to obtain the same, made efforts to do so, although plaintiff undertook to arrange the same, and were unable to finance the said work, as a consequence of which the work contracted for was never started; that the plaintiff never completed with the said contract by completing or even undertaking the said work."

Defendants' amended affidavit of merits filed by leave of court March 22, 1937, contained the following allegations:

"These defendants and each of them admit that they executed a contract on the 14th day of July, A. D. 1936, by and with the plaintiff, and admit that by the terms of said contract certain work was to be done by the plaintiff on the premises of the defendants, and admit that defendants were to pay therefor, the sum of $1,063.50, in the manner following: the sum of $63.50 to be paid when the work should be completed and the balance to be handled by a Federal Housing Administration loan, as stated in the contract.

"These defendants and each of them state the facts to be that they and each of them were induced to execute the said contract on the fraudulent and false representations and premises of the plaintiff, through its agent or servant, one R. H. Battey, that plaintiff would arrange said work to be financed by Federal Housing Administration loan as stated in the contract, and that if said loan was not obtained, the contract executed by them would be returned cancelled to said defendants, without charge of any kind.

"These defendants and each of them state the fact to be that in a letter received by them and sent by plaintiff, dated the 6th day of August, 1936, they were advised by the plaintiff that in accordance with the contract plaintiff had attempted to obtain a Federal Housing Administration Loan but was unsuccessful, and requesting that thereafter defendants make efforts to obtain the loan elsewhere.

"These defendants and each of them state that in said letter plaintiff admitted the understanding that said work was to be financed as aforesaid, and as stated in the contract.

"These defendants and each of them state that no work was ever done on their said premises and that they are not indebted to the plaintiff in the sum of $319.40 or in any other sum of money whatsoever."

In our opinion both the original and amended affidavits of merits filed by defendants were sufficient. Both stated a legal defense and the specific nature thereof. Both raised material issues of fact upon which they were entitled to a trial. It is difficult to understand why on February 5, 1937, their original affidavit of merits was stricken and their motion to vacate the judgment by confession denied. When an opportunity was again presented on March 22, 1937, to vacate the erroneous order of February 5, 1937, the trial court persisted in depriving defendants of a trial on the merits. Why, after so denying defendants' motion on March 22, 1937, and effectually disposing of the case, the court then granted leave to defendants to file an amended affidavit of merits we are at a loss to understand.

Defendants' amended affidavit of merits filed by leave of court March 22, 1937, contained the following allegations:

"These defendants and each of them admit that they executed a contract on the 14th day of July, A. D. 1936, by and with the plaintiff, and admit that by the terms of said contract certain work was to be done by the plaintiff on the premises of the defendants, and admit that defendants were to pay therefor, the sum of $1,065.60, in the manner following, the sum of $65.60 to be paid when the work should be completed and the balance to be handled by a Federal Housing Administration loan, as stated in the contract.

"These defendants and each of them aver to the facts to be that they and each of them were induced to execute the said contract on the representations and false representations and promises of the plaintiff, through its agent or servant, one H. H. Battey, that plaintiff would arrange said work to be financed by Federal Housing Administration loan as stated in the contract, and that if said loan was not obtained, the contract executed by them would be returned cancelled to said defendants, without charge of any kind.

"These defendants and each of them state the fact to be that in a letter received by them and each by plaintiff, dated the 6th day of August, 1936, they were advised by the plaintiff that in accordance with the contract plaintiff had attempted to obtain a Federal Housing Administration loan but was unsuccessful, and requesting that thereafter defendants make efforts to obtain the loan elsewhere.

"These defendants and each of them state that in said letter plaintiff admitted the understanding that said work was to be financed as aforesaid, and as stated in the contract.

"These defendants and each of them state that no work was ever done on their said premises and that they are not indebted to the plaintiff in the sum of $65.60 or in any other sum of money whatsoever."

In our opinion both the original and amended affidavits of merits filed by defendants were sufficient. Both stated a legal defense and the specific nature thereof. Both raised material issues of fact upon which they were entitled to a trial. It is difficult to understand why on February 5, 1937, their original affidavit of merits was stricken and their motion to vacate the judgment by default denied. Then an opportunity was again presented on March 22, 1937, to vacate the erroneous order of February 5, 1937, the trial court persisted in depriving defendants of a trial on the merits. Why, after so denying defendants' motion on March 22, 1937, and effectually disposing of the case, the court then granted leave to defendants to file an amended affidavit of merits we are at a loss to understand.

Inasmuch as this case will in all likelihood be tried on its merits, we refrain from any further discussion of the facts presented by the pleadings.

Defendants' petition to vacate the judgment by confession was sufficient, their original affidavit of merits was sufficient, their amended affidavit of merits was sufficient and they were entitled to a trial on the merits.

Therefore the order of the Municipal court of February 5, 1937, striking defendants' original affidavit of merits and overruling their motion to vacate the judgment by confession is reversed, as is also the order of March 22, 1937, denying defendants' motion to vacate the order of February 5, 1937, and the cause is remanded with directions that same proceed to a hearing on defendants' amended affidavit of merits filed by leave of court on March 22, 1937.

REVERSED AND REMANDED WITH DIRECTIONS.

Friend, P. J., and Scanlan, J., concur.

Inasmuch as this case will in all likelihood be tried on its merits, we refrain from any further discussion of the facts presented by the pleadings.

Defendants' petition to vacate the judgment by confession was sufficient, their original affidavit of merits was sufficient, their amended affidavit of merits was sufficient and they were entitled to a trial on the merits.

Therefore the order of the ~~Municipal~~ court of January 5, 1927, striking defendants' original affidavit of merits and overruling their motion to vacate the judgment by confession is reversed, as is also the order of March 22, 1927, denying defendants' motion to vacate the order of January 5, 1927, and the cause is remanded with directions that same proceed to a hearing on defendants' amended affidavit of merits filed by leave of court on March 22, 1927.

REVERSED AND REMANDED WITH DIRECTIONS.

Friend, P. J., and Hanson, J., concur.

39610

PEARL TAYLOR WILLIS,
Appellee,

v.

CITY OF CHICAGO, a
municipal corporation,
Appellant.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

15A

296 I.A. 638[4]

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This is an action brought by Pearl Taylor to recover damages for personal injuries resulting from the collapse of a portion of a sidewalk on East 59th street, Chicago. After starting suit she married one Thorn Willis and by order of court her name as plaintiff was changed accordingly. The case was tried before a jury which gave her a verdict for $1,200. After the court directed and plaintiff agreed to a remittitur of $200, judgment was entered against defendant, City of Chicago, for $1,000 and costs. This appeal followed.

May 30, 1934, one Marshall Lee Jackson operated a grocery store at 6059 South State street, Chicago, which was the northeast corner of 61st and State streets. The store faced west. The south wall of the building in which Jackson had his store ran from State street east along the north line of the sidewalk on the north side of 61st street toward an alley in the rear which entered said 61st street. There were two side entrances into this building, one at 8 East 61st street, which was an entrance to the rear of Jackson's store, and the other at 10 East 61st street, which led into an apartment which Jackson had sublet to one Dan Lewis.

A steel plate containing glass prisms ran east and west immediately alongside the building for a distance of from four to

39020

FRANK TAYLOR FIRST,
Appellee,

v.

CITY OF CHICAGO, a
municipal corporation,
Appellant.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

29GIA.638

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This is an action brought by Frank Taylor to recover damages for personal injuries resulting from the collapse of a portion of a sidewalk on south 5th street, Chicago. After starting suit she married one Thorn Hills and by order of court her name was plaintiff was changed accordingly. The case was tried before a jury which gave her a verdict for $1,200. After the court directed and plaintiff agreed to a remittitur of $200, judgment was entered against defendant, City of Chicago, for $1,000 and costs. This appeal followed.

May 30, 1924, one Kenneth Lee Jackson operated a grocery store at 6038 south state street, Chicago, which was the northeast corner of flat and state streets. The store faced west. The south wall of the building in which Jackson had his store ran from state street east along the north line of the sidewalk on the north side of flat street toward an alley in the rear which entered said flat street. There were two side entrances into this building, one at 8 feet flat street, which was an entrance to the rear of Jackson's store, and the other at 10 feet flat street, which led into an apartment which Jackson had rented to one Ken Lewis.

A steel plate containing glass prisms ran east and west immediately along side the building for a distance of from four to

six feet between the two entrances at 8 and 10 East 61st street and extended out into the sidewalk from two and one-half to four feet. While plaintiff was either standing on this steel plate talking to Lewis and others who were in the entrance to Lewis's apartment at 10 East 61st street or on the sidewalk in front of same, or while she was walking across this plate toward the entrance to Lewis's apartment, the steel plate gave way under her, causing her to fall through the hole thus left in the sidewalk, a distance of from six to nine feet, into a tunnel or vault space under said sidewalk. There was evidence that the steel plate rested upon a steel base or framework which remained around the opening after the plate had fallen through; that "this framework rested on cross beams," which extended from the wall of the building to the edge of the plate; and that a steel rod or beam ran along between the plate and the adjoining slab of concrete upon which both rested. It is conceded by the city that the slab of concrete constituting the portion of the sidewalk immediately to the east of the plate that fell and which extended south of the south line of said plate was in a defective condition in that it was cracked at about its east-west center line. Both halves of this cracked slab sloped towards its center, forming a "cup-shaped" or "dished-in" space, which had for a considerable period of time been filled in with earth, "so that people would not stumble over it."

Defendant's contentions, as stated in its brief, are that "prior to the accident the defendant had no notice of any defective condition that could cause the collapse of the steel plate; that there was no causal relation, and the evidence properly interpreted, does not show such a relation between the defective slab of concrete and the giving away of the steel plate which resulted in the plaintiff's injuries;" and that "plaintiff's own testimony clearly es-

six feet between the two entrances at 8 and 10 East 21st street and extended out into the sidewalk from two and one-half to four feet. While plaintiff was either standing on this steel plate talking to Davis and others who were in the entrance to Davis's apartment at 10 East 21st street or on the sidewalk in front of same, or while she was walking across this plate toward the entrance to Davis's apartment, the steel plate gave way under her, causing her to fall through the hole thus left in the sidewalk, a distance of from six to nine feet, into a tunnel or vault space under said sidewalk. There was evidence that the steel plate rested upon a steel base or framework which remained around the opening after the plate had fallen through; that "this framework rested on cross beams," which extended from the wall of the building to the edge of the plate; and that a steel rod or beam ran along between the plate and the adjoining slab of concrete upon which both rested. It is conceded by the city that the slab of concrete constituting the portion of the sidewalk immediately to the east of the plate that fell and which extended south of the south line of said plate was in a defective condition in that it was cracked at about its east-west center line. Both halves of this cracked slab sloped towards its center, forming a "cup-shaped" or "dished-in" space, which had for a considerable period of time been filled in with earth, "so that people would not stumble over it."

Defendant's contentions, as stated in its brief, are that "prior to the accident the defendant had no notice of any defective condition that could cause the collapse of the steel plate; that there was no causal relation, and the evidence properly interpreted, does not show such a relation between the defective slab of concrete and the giving way of the steel plate which resulted in the plaintiff's injuries;" and that "plaintiff's own testimony clearly es-

tablishes the fact that plaintiff's residence at the time of the accident, and for a year continuously thereafter was at an address other than that contained in the notice, and that said notice for that reason is fatally defective."

Plaintiff's theory is that the east-west depression or crack in the concrete slab immediately to the east of the glass studded steel plate did contribute to the collapse of same; that "the defendant had constructive notice of the defect causing or tending to cause the collapse of the glass studded steel plate;" that "as a matter of law the defendant is liable to the plaintiff for the collapse of the glass studded steel plate;" that "the Statutory Notice served upon the defendant complied with the requirements of Section 7, Chapter 70, the Injuries Act, Ill. State Bar Stats. 1935;" and that "the court did not err in receiving the Statutory Notice in evidence and in denying defendant's motion for a directed verdict and in arrest of judgment."

After a careful examination and consideration of all the evidence in the record we are unable to reach any satisfactory or reasonable conclusion as to what caused the steel plate in the sidewalk to collapse or give way, precipitating plaintiff to the floor of the vault under said sidewalk. Plaintiff's case was tried below unquestionably upon the theory that the defective slab of concrete in the sidewalk caused the steel plate to collapse or was at least one of the contributing causes of such collapse. It was upon the obvious defects in that slab for a period of two years or more that she predicated constructive notice to the city of the defective condition of the sidewalk, including the steel plate and its supports. While some of plaintiff's witnesses offered testimon that might be construed as tending to show that the defective slab of concrete contributed in some unexplained manner to the giving way of the steel plate, the evidence presented in plaintiff's

tablishes the fact that plaintiff's residence at the time of the accident, and for a year continuously thereafter was at an address other than that contained in the notice, and that said notice for that reason is totally defective."

Plaintiff's theory is that the east-west depression or crack in the concrete slab immediately to the east of the glass studded steel plate did contribute to the collapse of same; that "the defendant had constructive notice of the defect causing or tending to cause the collapse of the glass studded steel plate;" that "as a matter of law the defendant is liable to the plaintiff for the collapse of the glass studded steel plate; that "the statutory notice served upon the defendant complied with the requirements of Section 7, Chapter 70, the Laws of Ill. State Bar State, 1935;" and that "the court did not err in excluding the statutory notice in evidence and in denying defendant's motion for a directed verdict and in entered of judgment."

After a careful examination and consideration of all the evidence in the record we are unable to reach any settled opinion or reasonable conclusion as to what caused the steel plate in the sidewalk to collapse or give way, precipitating plaintiff to the floor of the vault under said sidewalk. Plaintiff's case was tried below supposedly upon the theory that the defective slab of concrete in the sidewalk caused the steel plate to collapse or was at least one of the contributing causes of such collapse. It was upon the obvious defects in that slab for a period of two years or more that the predicated constructive notice to the city of the defective condition of the sidewalk, including the steel plate and its support. While some of plaintiff's witnesses offered testimony that might be construed as tending to show the defective slab of concrete contributed in some unexplained manner to the giving way of the steel plate, the evidence presented in plaintiff's

behalf, considered in its entirety, was confusing and contradictory. By reason of the indefinite and unsatisfactory nature of the evidence in the record and the failure to present material evidence, the jury could only speculate as to what caused the steel plate to give way.

Since we feel that the ends of justice will be best served by a retrial of this case, we refrain from discussing the testimony of the witnesses in detail.

As to defendant's contention that the statutory notice served on the City of Chicago by plaintiff was fatally defective in that there was a variance between her place of residence as stated in said notice and her place of residence as testified to by her at the trial, the rule is that if the evidence as to such variance is undisputed plaintiff would be precluded from maintaining her action, but if the evidence is conflicting as to such variance, whether or not plaintiff's place of residence was as stated in the notice presents a controverted question of fact for the jury to decide. While plaintiff did testify that her place of residence was other than that stated in the notice, there was evidence that tended to show that her place of residence was as stated in the notice. This is a matter which should be susceptible of direct positive proof on another trial.

The notice required to be served on the city and which was served conforms strictly with the provisions of the statute and that plaintiff may have been confused in making the answers which she did as to her place of residence is borne out to some extent at least by the following statement of the attorney who tried the case for the city: "We have taken into consideration the intelligence of this woman. You could ask her if she lived at 1624 West 64th street, and she might say that she did."

behalf, considered in its entirety, was convincing and credible-
tory. By reason of the indefinite and unsatisfactory nature of
the evidence in the record and the failure to present material
evidence, the jury could only speculate as to what caused the
steel plate to give way.

Since we feel that the ends of justice will be best served
by a retrial of this case, we refrain from discussing the testimony
of the witnesses in detail.

As to defendant's contention that the statutory notice served
on the city of Chicago by plaintiff was totally defective in that
there was a variance between her place of residence as stated in said
notice and her place of residence as testified to by her at the
trial, the rule is that if the evidence as to such variance is un-
disputed plaintiff would be precluded from maintaining her action,
but if the evidence is conflicting as to such variance, whether or
not plaintiff's place of residence was as stated in the notice pre-
sents a controverted question of fact for the jury to decide. While
plaintiff did testify that her place of residence was other than
that stated in the notice, there was evidence that tended to show
that her place of residence was as stated in the notice. This is
a matter which should be susceptible of direct positive proof on
another trial.

The notice required to be served on the city and which was
served conformed strictly with the provisions of the statute and that
plaintiff may have been confused in making the answers which she did
as to her place of residence is borne out to some extent at least
by the following statement of the attorney who tried the case for
the city: "We have taken into consideration the intelligence of
this woman. You could ask her if she lived at 1234 East 56th street,
and she might say that she did."

We are constrained to hold that the issues involving the statutory notice should be retried with the other issues in the case.

For the reasons indicated herein the judgment of the circuit court is reversed and the cause remanded for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED.

Scanlan and Sullivan, JJ., concur.

We are constrained to hold that the issues involving the statutory notice should be retried with the other issues in the case.

For the reasons indicated herein the judgment of the circuit court is reversed and the cause remanded for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED.

Keenan and Sullivan, JJ., concur.

39645

UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation,
Appellee,

v.

MARTIN AUTO PARTS COMPANY, a corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

296 I.A. 639

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This appeal seeks to reverse a summary judgment for $549.53 entered March 4, 1937, in favor of plaintiff, United States Fidelity and Guaranty Company, and against defendant, Martin Auto Parts Company. Commencing August 12, 1930, and thereafter until and including August 12, 1934, plaintiff issued annually to defendant its Standard Workmen's Compensation and Employer's Liability Policy. The policy issued on the last mentioned date was cancelled December 29, 1934. Under each of these policies defendant paid an estimated initial premium and obligated itself to pay an additional premium at the end of each policy year based upon an audit made by plaintiff of defendant's records showing the total compensation paid by the latter to its employees in the various classifications specified in the policies and then applying the rate of premium alleged to be chargeable against the yearly compensation paid the employees in such classifications. For the four years ending August 12, 1934, defendant paid the initial premiums and the additional premiums determined by plaintiff's auditor and for which statements were rendered to the insured. A controversy having arisen over the policy issued to

39645

UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation, Appellee,	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
v.	
MARTIN AUTO PARTS COMPANY, a corporation, Appellant.	

39641.A. 639

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This appeal seeks to reverse a summary judgment for $540.53 entered March 4, 1937, in favor of plaintiff, United States Fidelity and Guaranty Company, and against defendant, Martin Auto Parts Company. Commencing August 12, 1930, and thereafter until and including August 12, 1934, plaintiff issued annually to defendant its standard workmen's Compensation and Employer's Liability Policy. The policy issued on the last mentioned date was cancelled December 29, 1934. Under each of these policies defendant paid an estimated initial premium and obligated itself to pay an additional premium at the end of each policy year based upon an audit made by plaintiff of defendant's records showing the total compensation paid by the latter to its employees in the various classifications specified in the policies and then applying the rate of premium alleged to be chargeable against the yearly compensation paid the employees in such classifications. For the four years ending August 12, 1934, defendant paid the initial premiums and the additional premiums determined by plaintiff's auditor and for which statements were rendered to the insured. A controversy having arisen over the policy issued to

defendant August 12, 1934, for the ensuing year, same was cancelled, as heretofore stated, on December 29, 1934, no audit of defendant's books was made for the portion of the year that policy was in effect and no additional premium was paid on said policy.

Plaintiff's statement of claim filed August 7, 1935, in addition to setting forth the issuance of the policies and the amounts of the premiums paid thereon and attaching as exhibits 1, 2, 3, 4 and 5, copies of the several policies issued, respectively, on Aug. 12, 1930, Aug. 12, 1931, Aug. 12, 1932, Aug. 12, 1933 and Aug. 12, 1934, and the alleged indorsements or amendments thereto, as well as an exhibit identified as "A", averred substantially that the original policy covered only the place of business of defendant at 3359 North Ashland avenue; that by indorsement of April 1, 1931, attached to said policy there was included under its coverage the place of business of defendant at 2036 Dominick street, Chicago; that "the defendant, by false and fraudulent misrepresentations, advised plaintiff that there was no dismantling at Dominick street and by false and fraudulent representations until Novemver 7, 1934, misrepresented the classification and amount of total payroll;" that "said misrepresentations included, among other things, that many employees were classified under the heading of 'Clerk' *** whereas, they really were employed in classification of Service Station and Store;" that "upon discovery of the misrepresentations and of the fact that the plaintiff in accordance with the terms of said policies was entitled to additional premiums thereunder, the said plaintiff demanded complete payroll records for the entire period covered by the policies, so that the said plaintiff could take a complete and accurate audit for the entire period as provided in said policies;" that "the defendant refused to disclose actual remuneration, the actual number of employees and the actual activi-

defendant August 12, 1934, for the ensuing year, some was cancelled, as hereinbefore stated, on December 31, 1934, no audit of defendant's books was made for the portion of the year that policy was in effect and no additional premium was paid on said policy.

Plaintiff's statement of claim filed August 7, 1935, in addition to setting forth the issuance of the policies and the amounts of the premiums paid thereon and attaching as exhibits 1, 2, 3, 4 and 5, copies of the several policies issued, respectively, on Aug. 12, 1930, Aug. 12, 1931, Aug. 12, 1932, Aug. 12, 1933 and Aug. 12, 1934, and the alleged indorsements or amendments thereto, as well as an exhibit identified as "A", averred substantially that the original policy covered only the place of business of defendant at 3330 North Kildare avenue; that by indorsement of April 1, 1931, attached to said policy there was included under its coverage the place of business of defendant at 2020 Dominick street, Chicago; that "the defendant, by false and fraudulent misrepresentations, advised plaintiff that there was no discontinuing at Dominick street and by false and fraudulent representations until November 7, 1934, misrepresented the classification and amount of total payroll;" that "said misrepresentations included, among other things, that many employees were classified under the heading of 'Clerk' *** whereas, they really were employed in classification of service station and store;" that "upon discovery of the misrepresentations and of the fact that the plaintiff in accordance with the terms of said policies was entitled to additional premiums thereunder, the said plaintiff demanded complete payroll records for the entire period covered by the policies, so that the said plaintiff could take a complete and accurate audit for the entire period as provided in said policies;" that "the defendant refused to disclose actual commission, the actual number of employees and the actual activi-

ties that said employees were engaged in;" that "defendant is indebted to plaintiff in the sum of $7,416.10, after allowing all credits due it;" that "this sum is based upon a proportionate increase in the amounts of premium that should have been paid by defendant had not said defendant fraudulently concealed and deceived plaintiff as hereinbefore set forth;" and plaintiff prayed that judgment be rendered for said sum of $7,416.10 "as per statement hereto attached, marked exhibit 'A'", which is as follows:

"UNITED STATES FIDELITY AND GUARANTY COMPANY

****

July 19, 1935

Martin Auto Parts Co.,
3359 N. Ashland Ave.,
Chicago, Ill.

Chicago, Ill. Dr.

Number	Date	Assured	Charge	Credit	Net
Z-511191	8/12/30 to 8/12/31	Earned Premium on Workmen's Compensation policy	778.63		
Z-613833	8/12/31 to 8/12/32	ditto	1171.73		
Z-655539	8/12/32 to 8/12/33	ditto	1734.90		
Z-700684	8/12/33 to 8/12/34	ditto	2882.00		
Z-734379	8/12/34 to 12/29/34	ditto	872.34		
AB-115888	Canc. 2/6/35	Return premium on auto		23.50	
					$7416.10"

On August 19, 1935, defendant filed its appearance and demand for a jury trial. Defendant's affidavit of merits filed in its behalf by its president September 19, 1935, is as follows:

"That he admits that on or about, to-wit: the 12th day of August 1930 that F. Joseph Ryan solicited the insurance of the defendant and made certain representations with reference to it, and that in pursuance to said representations, that a policy of insurance of the plaintiff was issued, but the defendant denies that on May 20, 1931, that said policy was amended by endorsement effective as of February 9, 1931, and on May 20, 1931, said policy was further amended and denies that said plaintiff's Exhibit '1' is a true and correct copy of said policy.

"Defendant further says that he admits that through one F. Joseph Ryan that on or about the 12th day of August, 1931, a policy of insurance with the United States Fidelity and Guaranty

stee that said employees were engaged in;" that "defendant is indebted to plaintiff in the sum of $7,416.10, after allowing all credits due it;" that "this sum is based upon a proportionate increase in the amounts of premium that should have been paid by defendant had not said defendant fraudulently concealed and deceived plaintiff as hereinbefore set forth;" and plaintiff prayed that judgment be rendered for said sum of $7,416.10 "as per statement hereto attached, marked exhibit 'A'", which is as follows:

"UNITED STATES CASUALTY AND INDEMNITY COMPANY

July 14, 1953

Martin Auto Parts Co.,
3329 S. Ashland Ave.,
Chicago, Ill.

Chicago, Ill. In.

Number	Date	Issued	Charge	Credit	Net
T-51121	6/12/00 to 6/12/01	Earned Premium on Workmen's Compensation policy	778.65		
X-61383	8/12/01 to 8/12/02	Ditto	1171.75		
Z-65555	8/12/02 to 8/12/03	Ditto	1724.50		
N-77034	8/12/03 to 8/12/04	Ditto	2852.00		
X-73427	8/12/04 to 12/12/04	Ditto	872.34		
AB-11338	June, 1/1/05	Return premium on auto		23.50	
			$7416.10"		

On August 12, 1955, defendant filed its appearance and demand for a jury trial. Defendant's affidavit of merits filed in its behalf by its president September 12, 1955, is as follows:

"That he admits that on or about, to-wit: the 14th day of August 1950 that T. Joseph Ryan solicited the insurance of the defendant and made certain representations with reference to it, and that in pursuance to said representations, that a policy of insurance of the plaintiff was issued, but the defendant denies that on May 20, 1951, that said policy was amended by endorsement effective as of February 1, 1951, and on May 20, 1951, said policy was further amended and denies that said plaintiff's Exhibit 'A' is a true and correct copy of said policy.

"Defendant further says that he admits that through one T. Joseph Ryan that on or about the 14th day of August, 1951, a policy of insurance with the United States Casualty and Indemnity

Company was issued pursuant to certain representations made by the said F. Joseph Ryan, but denies that amendments were made as set forth in the plaintiff's statement of claim, excepting that on or about, to-wit: the first day of April, 1931, the policy was amended to include 2036 Dominick Street, Chicago, Illinois.

"Defendant further answering says that he admits that there was a certain policy issued through the solicitation of F. Joseph Ryan, but says that the plaintiff is not entitled to recover the compensation as set forth under Paragraph 3.

"Defendant further answering admits that a certain policy of insurance was issued on August 12, 1933 and 1934, but as to said amendments as set forth in the Statement of Claim as Exhibit 4 and Exhibit 5 as relates to said amendments, this defendant requires strict proof thereof and denies that the amendments set forth in the Statement of Claim are as issued to the defendant company.

"Defendant further answering says that the rate of premium charged by the plaintiff company was far in excess of the liability or hazard they assumed and denies that any misrepresentations were made by the Martin Auto Parts Company at any time, and denies that the actual amount of remuneration earned by the employees was not given to the plaintiff company.

"Defendant further says that they are not advised as to the manual of rates used by the plaintiff company at the date of the issue of the policy and requires strict proof thereof.

"Defendant further answering says that they are not advised with reference to Code No. 8387, 8810 or 3821 and that 2036 Dominick Street, Chicago, Illinois, was not in existence at the time the policy Exhibit '1' was issued.

"Defendant further answering says that no false or fraudulent representations were made with reference to 2036 Dominick street, and there were no employees classified under the heading of clerks who were not clerks.

"Defendant further answering says that the plaintiff is not entitled to recover under the terms of said policies, additional premiums thereunder, and the defendant further says that they furnished the plaintiff with a complete payroll record for the entire period covered by the policies excepting the latter half of 1934 and on the advice of competent counsel they refused to furnish the latter part of 1934 to the plaintiff company after they had indicated they were going to cancel the said policy of insurance, and the defendant refused to accept said policy of the plaintiff company until an adjustment had been made on the year previous to the issuance of said policy.

"Defendant further answering denies that the Martin Auto Parts Company are indebted to the plaintiff company in any sum of money whatsoever as set forth in the plaintiff's statement of claim under Exhibit 'A'."

Pursuant to notice served on plaintiff's by defendant's counsel, in which it was stated "I shall ask for a rule on you

Company was issued pursuant to certain representations made by the said T. Joseph Lynn, but denies that such representations were made as set forth in the plaintiff's statement of claim, except that on or about, to-wit, the first day of April, 1931, the policy was amended to include 2038 Dominick Street, Chicago, Illinois.

"Defendant further answering says that he admits that there was a certain policy issued through the solicitation of T. Joseph Lynn, but says that the plaintiff is not entitled to recover the compensation as set forth under Paragraph 3.

"Defendant further answering admits that a certain policy of insurance was issued on August 12, 1930 and 1934, but as to said amendments as set forth in the statement of claim as exhibit 4 and exhibit 5 as relates to said amendments, this defendant requires strict proof thereof and denies that the amendments set forth in the statement of claim are issued to the defendant company.

"Defendant further answering says that the rate of premium charged by the plaintiff company was for in excess of the liability or hazard they assumed and denies that any misrepresentations were made by the Martin Lynn to the company at any time, and denies that the actual amount of remuneration earned by the employees was not given to the plaintiff company.

"Defendant further says that they are not advised as to the manual of rates used by the plaintiff company at the date of the issue of the policy and requires strict proof thereof.

"Defendant further answering says that they are not advised with reference to Lots 26, 8387, 8310 or 8321 and that 2038 Dominick Street, Chicago, Illinois, was not in existence at the time the policy exhibit 'I' was issued.

"Defendant further answering says that no false or fraudulent representations were made with reference to 2038 Dominick street, and there were no employees classified under the heading of clerks who were not clerks.

"Defendant further answering says that the plaintiff is not entitled to recover under the terms of said policies, additional premiums thereunder, and the defendant further says that they furnished the plaintiff with a complete payroll record for the entire period covered by the policies except the latter half of 1934 and on the advice of competent counsel they refused to furnish the latter part of 1934 to the plaintiff company after they had indicated they were going to cancel the said policy of insurance, and the defendant refused to accept said policy of the plaintiff company until an adjustment had been made on the year previous to the issuance of said policy.

"Defendant further answering denies that the Martin Lynn Co. Company are indebted to the plaintiff company in any sum of money whatsoever as set forth in the plaintiff's statement of claim under exhibit 'A'."

Instrument to notice served on plaintiff's by defendant's

counsel, in which it was stated "I shall ask for a rule on you

to itemize Exhibit 'A' *** under which you make claim for $7,416.10," the trial court on April 9, 1936, in sustaining defendant's motion said, "which last order will be, motion of defendant for more specific statement of claim allowed and ten days to file it and ten days thereafter to file an answer." On April 16, 1936, plaintiff, complying with the order of April 9, 1936, filed a "Specific Statement Itemizing Exhibit 'A' of Statement of Claim Filed by Plaintiff," which purported to show as to the several policies and policy years the "pay roll" as to each classification of employees, whether dismantling, service station or clerical, the "rate" of premium as to each such classification, the amount of premiums that should have been paid as to each qualification, the premium or premiums that were paid by defendant, and the additional premiums claimed to be due and owing from defendant to plaintiff, aggregating $7,416.10 for the period covered by all of the policies.

Defendant's answer to plaintiff's "Specific Statement Itemizing Exhibit 'A' of Statement of Claim," was as follows:

"Martin Auto Parts Company, a Corporation, by Leslie H. Whipp, its attorney, says that the Specific Statement of Claim filed by the plaintiff itemizing the charges against the defendant are not correct nor are the same in accordance with the premiums which were authorized by said policies issued by the United States Fidelity and Guaranty Company during the years 1930 to 1931 inclusive and including up to December 29, 1934, in that in each of said years, the deposit premium was paid by the defendant, and that after said initial premium was paid in each year, upon the inspection made by the plaintiff and an audit made by the plaintiff pursuant to said inspection, an additional premium shown by said inspection and audit was paid by the defendant, excepting the year 1934 when only the initial premium was paid and that the defendant holds the receipts of the plaintiff for such deposit premiums and additional premium.

"That in the year 1931, without reference to the policy of insurance issued by the plaintiff company, that the plaintiff company arbitrarily and without reason and cause therefor, wrongfully altered and changed the amounts of the payroll assigned to the various departments of the defendant company.

"That the amount of the item Dismantling is fixed at the sum of $12,908.02 when as a matter of fact it should be $556.06;

"That the amount of service station is fixed at the sum

to itemize Exhibit 'A' *** under which you make claim for $7,416.10," the trial court on April 9, 1956, in sustaining defendant's motion said, "which last order will be motion of defendant for more specific statement of claim allowed and ten days to file it and ten days thereafter to file an answer." On April 16, 1956, plaintiff, complying with the order of April 9, 1956, filed a "Specific Statement Itemizing Exhibit 'A' of Statement of Claim Filed by Plaintiff," which purported to show as to the several policies and policy years the "pay roll" as to each classification of employee, whether diamond-cutting, service station or clerical, the "rate" of premium as to each such classification, the amount of premium that should have been paid as to each classification, the premium or premiums that were paid by defendant, and the additional premiums claimed to be due and owing from defendant to plaintiff, amounting to $7,416.10 for the period covered by all of the policies.

Defendant's answer to plaintiff's "Specific Statement Itemizing Exhibit 'A' of Statement of Claim," was as follows:

"Martin Auto Parts Company, a Corporation, by Leslie H. Shipp, its attorney, says that the Specific Statement of Claim filed by the plaintiff itemizing the charges against the defendant are not correct nor are the same in accordance with the premiums which were authorized by said policies issued by the United States Casualty and Surety Company during the years 1950 to 1951 inclusive and amounting up to December 31, 1951, in that in each of said years, the deposit premium was paid by the defendant, and that after said initial premiums were paid in each year, upon the inspection made by the plaintiff and an audit made by the plaintiff pursuant to said inspection, an additional premium shown by said inspection and audit was paid by the defendant, excepting the year 1954 when only the initial premium was paid and that the defendant holds the receipts of the plaintiff for such deposit premium and additional premium.

"That in the year 1951, without reference to the policy of insurance issued by the plaintiff company, that the plaintiff company arbitrarily and without reason and cause therefor, wrongfully altered and changed the amount of the payroll assigned to the various departments of the defendant company.

"That the amount of the item diamondcutting is fixed at the sum of $12,900.02 when as a matter of fact it should be $556.00;

"That the amount of service station is fixed at the sum

of $9,270.96 when it should have been $12,349.10;

"That the amount of clerical at 3359 N. Ashland Avenue and 2036 Dominick Street is set up as $2,412.42 when as a matter of fact the proper charge should be $15,522.50;

"That in the year 1932 the amount of the item Dismantling is fixed at the sum of $18,918.07 when as a matter of fact it should be $1,834.28;

"That the amount of service station is fixed at the sum of $13,537.56 when it should have been $18,384.02.

"That the amount of clerical at 3359 N. Ashland Avenue and 2036 Dominick Street is set up as $3,535.64 when as a matter of fact the proper charge should be $15,820.22;

"That in the year 1933 the amount of the item Dismantling is fixed at the sum of $21,604.22 when as a matter of fact it should be $1,590.00;

"That the amount of service Station is fixed at the sum of $15,516.85, when it should have been $21,948.95;

"That the amount of clerical at 3359 N. Ashland Avenue and 2036 Dominick Street is set up as $4,537.68 when as a matter of fact the proper charge should be $16,307.36;

"That in the year 1934 the amount of the item Dismantling is fixed at the sum of $30,299.21 when as a matter of fact it should be $1,711.66;

"That the amount of service station is fixed at the sum of $21,766.01 when it should have been $31,449.22;

"That the amount of clerical at 3359 N. Ashland Avenue and 2036 Dominick Street is set up as $5,662.80 when as a matter of fact the proper charge should be $22,356.96;

"That in the year 1934 under Policy No. Z-734379 the amount of the item Dismantling is fixed at the sum of $11,540.97 when as a matter of fact it should be $978.66;

"That the amount of service station is fixed at the sum of $8,290.67 when it should have been $11,888.88;

"That the amount of clerical at 3359 N. Ashland Avenue and 2036 Dominick Street is set up as $2,156.96 when as a matter of fact the proper charge should be $9,373.07.

"That said statements so set forth in the specific statement of claim of the plaintiff were not set up in accordance with the inspection or auditor's report, but the same were arbitrarily fixed without reference to the policy of insurance, or the facts concerning the same, and that the defendant is not indebted to the plaintiff in the sum of money claimed by the plaintiff, and this the defendant is ready to verify."

On March 4, 1937, plaintiff moved for a summary judgment for an amount which it was asserted was admitted in defendant's affidavit of merits to be due and owing to plaintiff. This

of $9,270.06 when it should have been $12,342.10;

"That the amount of electrical at 3839 N. Ashland Avenue and 2036 Dominick Street is set up as $[illegible], when as a matter of fact the proper charge should be $15,382.50;

"That in the year 1952 the amount of the item Dismantling is fixed at the sum of $10,216.07 when as a matter of fact it should be $1,834.32;

"That the amount of service station is fixed at the sum of $13,327.56 when it should have been $18,283.02;

"That the amount of electrical at 3839 N. Ashland Avenue and 2036 Dominick Street is set up as $3,335.64 when as a matter of fact the proper charge should be $5,320.32;

"That in the year 1955 the amount of the item Dismantling is fixed at the sum of $21,604.32 when as a matter of fact it should be $1,390.00;

"That the amount of service station is fixed at the sum of $15,216.[illegible], when it should have been $21,9[illegible].95;

"That the amount of electrical at 3839 N. Ashland Avenue and 2036 Dominick Street is set up as $[illegible].38 when as a matter of fact the proper charge should be $6,307.38;

"That in the year 1956 the amount of the item Dismantling is fixed at the sum of $[illegible] when as a matter of fact it should be $1,711.66;

"That the amount of service station is fixed at the sum of $21,766.[illegible] when it should have been $31,449.[illegible];

"That the amount of electrical at 3839 N. Ashland Avenue and 2036 Dominick Street is set up as $[illegible].00 when as a matter of fact the proper charge should be $[illegible];

"That in the year 1958 under policy No. X-724279 the amount of the item Dismantling is fixed at the sum of $11,340.97 when as a matter of fact it should be $974.66;

"That the amount of service station is fixed at the sum of $8,290.97 when it should have been $11,58[illegible].38;

"That the amount of electrical at 3839 N. Ashland Avenue and 2036 Dominick Street is set up as $[illegible].96 when as a matter of fact the proper charge should be $[illegible].97.

"That said statements so set forth in the paragraphs stating of claim of the plaintiff were not set up in accordance with the inspection or auditor's report, but the same were arbitrarily fixed without reference to the policy of insurance, or the facts concerning the case, and that the defendant is not indebted to the plaintiff in the sum of money claimed by the plaintiff, and this the defendant is ready to verify."

On March 4, 1957, plaintiff moves for a summary judgment for an amount which is varied and admitted in defendant's affidavit of merits to be due and owing to plaintiff. This

motion was allowed and as heretofore shown judgment was entered against defendant for $549.53 and the trial of the case ordered to proceed as to the balance of plaintiff's claim.

In view of the manner in which the proceedings in this cause were conducted in the court below, plaintiff's original statement of claim and its specific statement itemizing Exhibit "A" considered together must be held to constitute the more specific statement of claim, which the court on April 9, 1936, ordered filed.

The question then is whether defendant's affidavit of merits, including as a part thereof its answer to plaintiff's itemization of Exhibit "A", definitely made such an admission of indebtedness to plaintiff as to any part of its claim as set forth in the latter's specific statement of claim as to warrant the entry of the summary judgment. We are of the opinion that it did.

Plaintiff's position is that by taking the figures set forth in defendant's answer to the specific itemization of exhibit "A" as to the compensation paid to the employees of the insured in the various classifications during the several policy years and applying to same the rates of premium shown in the policies for the respective years, there is admitted to be due and owing to plaintiff from defendant $616.04 for premiums earned over and above the premiums paid by the insured; and that by deducting certain credits admitted to be due from plaintiff to defendant amounting to $66.51 from the aforesaid $616.04, a balance is shown to be due plaintiff for unpaid premiums in the sum of $549.53, for which amount the judgment was entered.

There is no denial by defendant in either its affidavit of merits or in its answer to the itemization of Exhibit "A" that it contracted to pay plaintiff premiums under the terms of the several policies at the rates provided therein. Taking the pay roll figures

motion was filed, and a hearing thereon judgment was entered against defendant for $40,53, and the trial of the case ordered to proceed as to the balance of plaintiff's claim.

In view of the manner in which the proceedings in this cause were conducted in the court below, plaintiff's original statement of claim and its specific statement identifying exhibit "A" considered together must be held to constitute the more specific statement of claim, which the court in April, 1926, ordered filed.

The question then is whether defendant's affidavit of merits, including as a part thereof its answer to plaintiff's identification of exhibit "A", definitely made such an admission of indebtedness to plaintiff as to any part of its claim as set forth in the latter's specific statement of claim as to warrant the entry of the summary judgment. We are of the opinion that it did.

Plaintiff's position is that by taking the figures set forth in defendant's answer to the specific identification of exhibit "A" as to the compensation paid to the employees of the insured in the various classifications during the several policy years and applying to same the rates of premium shown in the policies for the respective years, there is admitted to be due and owing to plaintiff from defendant $[illegible] for premiums earned over and above the premiums paid by the insured; and that by deducting certain credits admitted to be due from plaintiff to defendant amounting to $[illegible] from the aforesaid $[illegible], a balance is shown to be due plaintiff for unpaid premiums in the sum of $40.53, for which amount the judgment was entered.

There is no denial by defendant in either its affidavit of merits or in its answer to the identification of exhibit "A" that it contracted to pay plaintiff premiums under the terms of the several policies at the rates provided therein. Taking the pay roll figures

recited by defendant in its said answer and computing the premiums due thereon at the rates specified in the respective policies, the result reached is indicated by the following tabulation:

POLICY FOR YEAR FROM AUGUST 12, 1931, to AUGUST 12, 1932.

Classification of employees.	Pay roll	Rate	Premium	
Dismantling	$ 1,834.28	$7.01	$128.58	
Service Station	18,384.02	1.29	237.15	
Clerical	15,820.22	.06	9.49	
		Total	375.22	
		Credit for Premiums paid	331.83	
		Balance	43.39	$43.39

POLICY FOR YEAR FROM AUGUST 12, 1932, to AUGUST 12, 1933.

Dismantling	1,590.00	9.06	144.05	
Service Station	21,948.95	1.64	359.96	
Clerical	16,307.36	.09	14.67	
		Total	518.68	
		Credit for Premiums paid	480.55	
		Balance	38.13	38.13

POLICY FOR YEAR FROM AUGUST 12, 1933, to AUGUST 12, 1934.

Dismantling	1,711.66	9.05	154.90	
Service Station	31,449.22	1.63	512.62	
Clerical	22,356.96	.08	17.88	
		Total	685.40	
		Credit for Premiums paid	219.40	
		Balance	466.00	466.00

POLICY FOR YEAR FROM AUGUST 12, 1934, to August 12, 1935.

Dismantling	978.66	8.21	80.35	
Service Station	11,888.88	1.58	187.84	
Clerical	9,373.07	.09	8.43	
		Total	276.62	
		Credit for Premiums paid	208.10	
		Balance	68.52	68.52
		Total amount due		616.04
		Credit for returned auto premium		24.00
		Balance		592.04
		Credit for over payment		42.51
		Total owed		549.53

From the result reached by the foregoing computation, the correctness of which is undisputed, it clearly appears that the trial court properly entered the summary judgment appealed from.

The original record filed in this court showed that on

recited by defendant in its said answer and computing the premiums due thereon at the rates specified in the respective policies, the result reached is indicated by the following tabulation:

POLICY NOW YEAR FROM AUGUST 12, 1921, to AUGUST 12, 1922

Classification of employees.	Pay roll	Rate	Premium
Diamantiing	1,924.28	.07.01	13.58
Service station	18,324.02	1.29	237.15
Clerical	15,820.22	.06	9.49
		Total	379.22
		Credit for	
		Premiums paid	334.88
		Balance	45.37

45.39

POLICY NOW YEAR FROM AUGUST 12, 1922, to AUGUST 12, 1923.

Diamantiing	1,590.00	9.06	144.05
Service station	21,942.95	1.64	359.96
Clerical	16,307.36	.09	14.67
		Total	518.68
		Credit for	
		Premiums paid	480.55
		Balance	38.13

38.13

POLICY NOW YEAR FROM AUGUST 12, 1923, to AUGUST 12, 1924.

Diamantiing	1,711.66	9.05	154.80
Service station	31,445.32	1.63	512.62
Clerical	22,326.96	.08	17.88
		Total	685.30
		Credit for	
		Premiums paid	512.40
		Balance	166.90

166.90

POLICY NOW YEAR FROM AUGUST 12, 1924, to August 12, 1925.

Diamantiing	978.66	8.21	80.35
Service station	11,880.83	1.08	187.64
Clerical	9,375.07	.09	8.43
		Total	276.62
		Credit for	
		Premiums paid	208.10
		Balance	68.52
		Total amount due	616.04
		Credit for returned auto premium	34.00
		Balance	582.04
		Credit for over payment	42.51
		Total owed	539.53

From the result reached by the foregoing computation, the correctness of which is undisputed, it clearly appears that the trial court properly entered the summary judgment appealed from.

The original record filed in this court showed that on

April 9, 1936, the following order was entered: "Now comes the defendant herein and moves the Court to strike statement of claim filed herein from the files of this cause, and the Court being fully advised in the premises, sustains said motion. And it is ordered by the Court that leave be and the same is hereby given plaintiff to file amended statement of claim in ten *** days from today and defendant time to file affidavit of merits extended ten *** days thereafter."

A report of proceedings of the hearing on April 9, 1936, on defendant's motion, contained in an additional record filed in this court discloses that the order last above quoted was entered through misprision of the minute clerk in the trial court, said court in ruling on the motion stating, "which last order will be, motion of defendant for more specific statement of claim allowed and ten days to file it and ten days thereafter to file an answer." That defendant made no motion to strike plaintiff's statement of claim is demonstrated by defendant's attorney's notice to plaintiff of the presentation of its motion, in which, as heretofore shown, it was stated "I shall ask for a rule on you to itemize Exhibit 'A' *** under which you make claim for $7,416.10."

The assertion of counsel for defendant in the latter's brief that he knew at the time of the entry by the clerk of the court of the order of April 9, 1936, that such order purported to strike plaintiff's statement of claim from the files is refuted by his statement to the court on the hearing of his motion that "motion is for a more specific statement of claim *** here's what I want set out more specifically," and that all that he desired was a statement itemizing Exhibit "A" of plaintiff's statement of claim, and it is also refuted by his treatment throughout the proceedings in the lower court of the original statement of claim as amended in effect by the specific statement itemizing Exhibit "A" of statement

April 9, 1936, the following order was entered: "Now comes the defendant herein and moves the Court to strike statement of claim filed herein from the files of this cause, and the Court being fully advised in the premises, sustains said motion. And it is ordered by the Court that leave be and the same is hereby given plaintiff to file amended statement of claim in ten *** days from today and defendant time to file affidavit of merits extended ten *** days thereafter."

A report of proceedings of the hearing on April 9, 1936, on defendant's motion, contained in an additional record filed in this court discloses that the order last above quoted was entered through misprision of the minute clerk in the trial court, said court in ruling on the motion stating, "which last order will be, motion of defendant for more specific statement of claim allowed and ten days to file it and ten days thereafter to file an answer." That defendant made no motion to strike plaintiff's statement of claim is demonstrated by defendant's attorney's notice to plaintiff of the presentation of its motion, in which, as heretofore shown, it was stated "I shall ask for a rule on you to itemize Exhibit 'A' *** under which you make claim for $7,14.10."

The assertion of counsel for defendant in the latter's brief that he knew at the time of the entry by the clerk of the court of the order of April 9, 1936, that such order purported to strike plaintiff's statement of claim from the files is refuted by his statement to the court on the hearing of his motion that "motion is for a more specific statement of claim *** here's what I want set out more specifically," and that all that he sought was a restatement itemizing Exhibit "A" of plaintiff's statement of claim, and it is also refuted by his treatment in our last the proceeding in the lower court of the original statement of claim as amended in effect by the specific statement itemizing Exhibit "A" of statement

of claim as the more specific statement of claim which the court on April 9, 1936, ordered plaintiff to file. As already stated defendant filed an answer on April 30, 1936, to plaintiff's itemization of Exhibit "A", which it hardly would have done if it had knowledge at that time that plaintiff's original statement of claim had been stricken. It would undoubtedly have moved to strike such itemization of Exhibit "A" as not stating a cause of action. After defendant had filed the record and its brief and abstract in this court, the trial court on October 9, 1937, in response to plaintiff's motion in the nature of a writ of error coram nobis under sec. 72 of the Civil Practice act to correct the record to speak the truth as to the aforesaid order of April 9, 1936, entered the following order:

"The above matter having come on to be heard upon the motion of the plaintiff herein, United States Fidelity and Guaranty Company, a Corporation, to correct the record of the above entitled cause so as to make such record speak the truth and the objections on behalf of the defendant to such motion, the Court having inspected the notice of motion of the defendant, Martin Auto Parts Company, a corporation, presented and filed on the 9th day of April, A. D. 1936, and the transcript of the proceedings had before the Court on said 9th day of April, A. D. 1936, and having heard the testimony of the court reporter, and having jurisdiction to make such corrections of the record and being fully advised in the premises, FINDS:

"That on the 9th day of April, A. D. 1936, a notice of motion was presented to this Court and filed by the defendant herein, Martin Auto Parts Company, a Corporation, asking for a rule on the plaintiff to itemize Exhibit 'A' in the above entitled cause and arguments were had before this Court for and against the said motion.

"That this Court ordered that the motion of defendant for more specific statement of claim be allowed and ten (10) days time to file it and ten (10) days thereafter to file an answer.

"That the Clerk of this Court in writing up the record in the above entitled cause did not enter the correct order of April 9th, A. D. 1936, but instead made the following wrongful entry upon the records:

"'Now comes the defendant herein and moves the Court to strike statement of claim filed herein from the files of this cause, and the Court being fully advised in the premises, sustains said motion. And it is ordered by the Court that leave be and the same is hereby given plaintiff to file amended statement of claim in ten (10) days from today and defendant time to file affidavit of merits extended ten (10) days thereafter.'

of claim as the more specific statement of claim which the court on April 9, 1936, ordered plaintiff to file. As already stated defendant filed an answer on April 3?, 1936, to plaintiff's itemization of Exhibit "A", which it hardly would have done if it had knowledge at that time that plaintiff's original statement of claim had been stricken. It would unquestionably have moved to strike such itemization of Exhibit "A" as not stating a cause of action. After defendant had filed the record and its brief and argument in this court, the trial court on October 5, 1937, in response to plaintiff's motion in the nature of a writ of error coram nobis under Sec. 72 of the Civil Practice Act to correct the record to speak the truth as to the aforesaid order of April 9, 1936, entered the following order:

"The above matter having come on to be heard upon the motion of the plaintiff herein, United States Fidelity and Guaranty Company, a corporation, to correct the record of the above entitled cause so as to make such record speak the truth and the objections on behalf of the defendant to such motion, the Court having inspected the notice of motion of the defendant, Martin Auto Parts Company, a corporation, presented and filed on the 4th day of April, A. D. 1936, and the transcript of the proceedings had before the Court on said 9th day of April, A. D. 1936, and having heard the testimony of the court reporter, and having jurisdiction to make such corrections of the record and being fully advised in the premises, FINDS:

"That on the 9th day of April, A. D. 1936, a notice of motion was presented to this Court and filed by the defendant herein, Martin Auto Parts Company, a corporation, making for a rule on the plaintiff to itemize Exhibit "A" in the above entitled cause and arguments were made before this Court for and against the said motion.

"That this Court ordered that the motion of defendant for more specific statement of claim be allowed and ten (10) days time to file it and ten (10) days thereafter to file an answer.

"That the Clerk of this Court in writing up the record in the above entitled cause did not enter the correct order of April 9th, A. D. 1936, but instead made the following nonsensical entry upon the records:

"'Now comes the defendant herein and moves the Court to strike statement of claim filed herein from the files of this cause, and the Court being fully advised in the premises, sustains said motion. And it is ordered by the Court that leave be and the same is hereby given plaintiff to file amended statement of claim in ten (10) days from today and defendant time to file affidavit of merits extended ten (10) days thereafter.'

"That the record in the above entitled cause should be corrected so as to make such record speak the truth, and

"It Is THEREFORE ORDERED that the order entered of record on the 9th day of April, A. D. 1936, as follows:

"'Now comes the defendant herein and moves the Court to strike statement of claim filed herein from the files of this cause, and the Court being fully advised in the premises, sustains said motion. And it is ordered by the Court that leave be and the same is hereby given plaintiff to file amended statement of claim in ten (10) days from today and defendant time to file affidavit of merits extended ten (10) days thereafter,' be vacated, set aside and held for naught.

"It Is FURTHER ORDERED that the following order be entered of record nunc pro tunc as of the 9th day of April, A. D. 1936.

"It Is ORDERED that the motion of the defendant for a more specific statement of claim be allowed, that the plaintiff have ten (10) days time to file same and the defendant have ten (10) days thereafter to file an answer thereto."

It was after the entry of this order in the trial court that plaintiff was permitted to file the additional record in this court showing such order and other matters relevant and material to the entry of the order of April 9, 1936. We have stated the facts at length pertaining to the order of April 9, 1936, because defendant in its original brief predicated its entire argument for the reversal of the judgment on the proposition that since by that order as shown in the original record plaintiff's statement of claim was stricken and the specific statement itemizing Exhibit "A" of statement of claim filed by plaintiff did not purport to state a cause of action, there was no statement of claim upon which any judgment could be based.

We are impelled to hold that plaintiff's statement of claim was not stricken on April 9, 1936, by the court's order, that the entry made by the clerk that day did not speak the truth as to the order of the court and that such statement of claim, together with the specific itemization of Exhibit "A", thereafter filed, constituted the more specific statement of claim which the court ordered filed and that same was adequate and sufficient to support the

"That the record in the above entitled cause should be corrected so as to make such record speak the truth, and

"It is THEREFORE ORDERED that the order entered of record on the 9th day of April, A. D. 1936, as follows:

"'Now comes the defendant herein and moves the Court to strike statement of claim filed herein from the file of this cause, and the Court being fully advised in the premises, sustains said motion. And it is ordered by the Court that leave be and the same is hereby given plaintiff to file amended statement of claim in ten (10) days from today and defendant time to file affidavit of merits extended ten (10) days thereafter,' be vacated, set aside and held for naught.

"It is FURTHER ORDERED that the following order be entered of record nunc pro tunc as of the 9th day of April, A. D. 1936.

"It is ORDERED that the motion of the defendant for a more specific statement of claim be allowed, that the plaintiff have ten (10) days time to file same and the defendant have ten (10) days thereafter to file an answer thereto."

It was after the entry of this order in the trial court that plaintiff was permitted to file the additional record in the court showing such order and other matters relevant and material to the entry of the order of April 9, 1936. We have stated the facts at length pertaining to the order of April 9, 1936, because defendant in its original brief predicated its entire argument for the reversal of the judgment on the proposition that since by that order as shown in the original record plaintiff's statement of claim was stricken and the specific statement identing Exhibit "A" of statement of claim filed by plaintiff did not purport to state a cause of action, there was no statement of claim upon which any judgment could be based.

We are impelled to hold that plaintiff's statement of claim was not stricken on April 9, 1936, by the court's order, that the entry made by the clerk that day did not speak the truth as to the order of the court and that such statement of claim, together with the specific identification of Exhibit "A", thereafter filed, constituted the more specific statement of claim which the court ordered filed and that same was adequate and sufficient to support the

judgment entered.

Since the points predicated on the lack of jurisdiction of the trial court to vacate or modify the order of April 9, 1936, after the expiration of thirty days from the entry of such order and urged by defendant in its reply brief for the reversal of the judgment, are not argued in said brief, it is unnecessary to discuss them and for the same reason it is unnecessary to discuss defendant's contention that this court erroneously permitted the additional record to be filed.

In any event it has been repeatedly held that where a clerk of a court has mistakenly entered an order that does not speak the truth, the court may at any time thereafter cause such order to be vacated and an order entered that does speak the truth, provided a proper memorial is available which indicates the true purpose intended to be effected by the order. So also may an order that does not speak the truth because of the misprision of the clerk of a court be corrected at any time within five years of its entry by motion in the nature of a writ of error coram nobis under sec. 72 of the Civil Practice act. It appears conclusively that the action of the trial court in correcting the order of April 9, 1936, was proper.

In passing upon this appeal we would rather believe that defendant's counsel did not become aware of the true import of the order of April 9, 1936, as entered, until after he perfected his appeal, when he sought to take advantage of it, than that he had knowledge of its untruthful contents from the date of its entry until the judgment was entered and did not call the attention of either the court or opposing counsel to same.

Such other points asare urged have been considered but in the view we take of this cause we deem it unnecessary to discuss them.

judgment entered.

Since the points presented on the issue of jurisdiction of the trial court to vacate or modify the order of April 9, 1936, after the expiration of thirty days, lies the duty of such order and urged by defendant in its reply brief for the reversal of the judgment, are not argued in such brief, it is unnecessary to discuss them and for the same reason it is unnecessary to discuss defendant's contention that this court erroneously permitted the additional record to be filed.

In any event it has been repeatedly held that during a term of a court has statutory authority to order that does not speak the truth, the court may at any time thereafter cause such order to be vacated and an order entered that does speak the truth, provided a proper memorial is available which indicates the true purpose intended to be effected by the order. So also may an order that does not speak the truth because of the misprision of the clerk of a court be corrected at any time within five years of its entry by motion in the nature of a writ of error coram nobis under sec. 72 of the Civil Practice Act. It appears conclusively that the action of the trial court in correcting the order of April 9, 1936, was proper.

In pending upon this appeal we could rather believe that defendant's counsel did not before learn of the true import of the order of April 9, 1936, as evidenced, until after he perfected his appeal, when he sought to take advantage of it, then that he had knowledge of its substantial contents from the date of its entry until the judgment was entered and did not call the attention of either the court or opposing counsel to same.

Much other points were urged have been considered, but in the view we take of this cause we deem it unnecessary to discuss them.

For the reasons indicated the judgment of the Municipal court will be affirmed.

JUDGMENT AFFIRMED.

Friend, P. J., and Scanlan, J., concur.

For the reasons indicated the judgment of the District court will be affirmed.

JUDGMENT AFFIRMED.

Friend, P. J., and Spanish, J., concur.

40104

PEOPLE OF THE STATE OF ILLINOIS,
Appellant,

v.

CASIMER KEMNETZ,
Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

296 I.A. 639

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This cause was consolidated for hearing in this court with case No. 40103. The opinion in No. 40103 is filed concurrently with this opinion. The facts in this case are identical with the facts in case No. 40103, with the exception that the information against Casimer Kemnetz in this case was signed and verified by one Richard Gehrke, Jr. The judgment rendered below in that case was the same as in this and the same questions are presented to this court. Our decision in that case (People of the State of Illinois v. Casimer Kemnetz) controls the questions presented here and for the reasons there stated this proceeding will necessarily have to be dismissed.

PROCEEDING DISMISSED.

Friend, P. J., and Scanlan, J., concur.

40104

PEOPLE OF THE STATE OF ILLINOIS,
Appellant,

v.

DARLINE KLAMETI,
Appellee.

ANNUAL TERM MCMXLVIII.

TERM OF CHICAGO.

29 I.A. 639

MR. JUSTICE MORAN DELIVERED THE OPINION OF THE COURT.

This cause was consolidated for hearing in this court with case No. 40103. The opinion in No. 40103 is filed concurrently with this opinion. The facts in this case are identical with the facts in case No. 40103, with the exception that the information against Darlene Klameti in this case was signed and verified by one Richard Cohrke, Jr. The judgment rendered below in that case was the same as in this and the same questions are presented to this court. Our decision in that case (People ex rel. State of Illinois v. Darlene Klameti) considers the questions presented here and for the reason there stated this proceeding will necessarily have to be dismissed.

PROCEEDING DISMISSED.

Friend, P. J., and Lewis, J., concur.

39710

PEOPLE OF THE STATE OF ILLINOIS, ex rel.
JOHN S. RUSCH,

(Relator) Appellee,

v.

EDNA BULLI, DOROTHY BERGER, ROSE AMORE,
NANCY DELMONACO, and KATIE PARDO,

(Respondents) Appellants.

APPEAL FROM

COUNTY COURT

COOK COUNTY.

296 I.A. 639

MR. PRESIDING JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the respondents, who were judges and clerks of election at a primary election held on April 14, 1936, and who upon a proceeding had before the County Court of Cook County were sentenced for contempt of court for violation of the Election Laws pertaining thereto. Edna Bulli, Dorothy Berger and Rose Amore, were sentenced to one year each in the Cook County jail, and Nancy Delmonaco and Katie Pardo to six months imprisonment in jail.

The petition upon which this proceeding was based states that a primary election was held on April 14, 1936; that in the 4th Precinct, 20th Ward, Chicago, the respondents were judges and clerks of the election, and while serving and acting as judges and clerks, knowingly, fraudulently and unlawfully made a false canvass, tally, proclamation and return of the votes cast in said precinct, and further unlawfully permitted persons to vote more than once, and also did unlawfully permit the same persons' names to be recorded in the poll books, and permitted some person or persons to vote both names at said primary election.

This petition was signed by John S. Rusch and sworn to by him before a notary public, and a hearing was had upon the matters set forth in the petition and the answer filed thereto. A final order was entered in which the court found the respondents guilty of the charges contained in the petition, and they were sentenced as heretofore stated, and committed to the Cook County jail.

The first point called to our attention by the respondents is that the finding of guilty is contrary to the evidence.

The evidence shows that thirteen witnesses testified they were registered and did not vote; three testified they voted on the Primary Day although they had moved from the precinct in which they registered; one testified that when he went to the polling place he was not asked where he lived; and one testified she sought assistance; that a woman gave her assistance and that the woman marked the ballot. It further appears from a witness who testified that her brother had been confined to the Great Lakes Hospital on Primary Day, although the poll books and registers showed that he voted. Another witness testified that one of the judges of election officiating in this precinct, marked the ballots of persons voting who appeared and asked for assistance, and that this was done in the absence of an associate, contrary to the provision of the Election Law.

The evidence shows that Robert E. Haythorne testified he was a student at the University of Chicago and that while he was present in the precinct from the opening of the polls to eleven o'clock in the morning, affidavits of assistance to voters were made out upon request of assistance, and after that time the law was not complied with, and that during the voting only one judge assisted the voters; that the Democratic precinct captain and the Republican precinct captain assisted the election officials in conducting the Primary Election, and that the Democratic precinct captain read and counted the Democratic ballots, and the Republican precinct captain, the Republican ballots; that after Dorothy Berger, one of the judges, had been calling the votes cast, for two hours, the Republican precinct captain started to count the ballots and when he saw that a ballot was blank, he would put a cross mark before the name of a candidate.

As to this conduct, the testimony of Haythorne was corroborated by Henry Hill, a student at the University of Chicago law school.

The first point called for our attention by the respondents is that the finding of guilty is contrary to the evidence.

The evidence shows that thirteen witnesses testified they were registered and did not vote; three testified they voted on the primary day although they had moved from the precincts in which they registered; one testified that she had no card on the polling place he was not asked where he lived; and one testified she thought maintenance; that a woman gave her registrars and that the woman marked the ballot. It further appears from a witness who testified that her brother had been confined to the Cook County Hospital on primary day, although the poll books and registrars showed that he voted. Another witness testified that one of the judges of election officiating in this precinct, marked the ballots of persons during the primary and asked for assistance, and that this was done in the absence of an assistant, contrary to the provisions of the election law.

The evidence shows that Robert G. Hutchins testified he was a student at the University of Chicago and that while he was present in the precinct from the opening of the polls to eleven o'clock in the morning, efficiency of assistance to voters were sent out upon requests of assistance, and after that time the law was not complied with, and that during the voting only one judge assisted the voters; that the Democratic precinct captain and the Republican precinct captain assisted the election officials in conducting the primary election, and that the Democratic precinct captain read and marked the Democratic ballots, and the Republican precinct captain, the Republican ballots; that after morning depart, one of the judges had been calling the roll, for two hours, the Republican precinct captain started to count the ballots and when he saw that a ballot was blank, he would put a cross mark before the name of a candidate.

As to this evidence, the testimony of Hutchins was contradicted by Henry Hill, a student at the University of Chicago who swore.

He testified that when Dorothy Berger handled ballots she would ask the voter if he wanted assistance, and if the voter wanted a Democratic ballot Dorothy, Berger, the Democratic judge, would go into the booth with the voter alone, and if the voter wanted a Republican ballot, then the Republican judge would go into the booth with the voter. This witness further testified that about 100 voters were assisted and that the last name in the poll books at the close of the polls was Mary Baso, on line 473, although from the poll books, (People's Exhibits 1 and 2,) 511 names appeared upon the books. This same witness further testified that whenever there was a blank square before the candidate Vacco's name, Senders Garbella would mark in a cross, and that this was done 8 times, that one Democratic ballot, in particular, was marked with a red lead pencil but that on that ballot there was no mark in the square before Vacco's name, so Garbella put a cross in the square before the name of Vacco, and when someone called Garbella's attention to the fact that the rest of the ballot was marked with a red lead pencil, Garbella erased the cross mark he had made with the black pencil and took a red lead pencil out of his pocket and marked a cross in the same square with the red lead pencil.

There is evidence in the record by Katherine Keeler, a handwriting expert, who expressed her opinion that 213 ballots had been tampered with, and she pointed out that the evidence appearing upon the face of the ballots showed they had been tampered with.

From the facts in the record it is evident there was evidence before the court that a number of voters in this particular precinct appeared in court and testified they did not appear at the polling place and vote by casting a ballot on the day in question, and it further appears that these very same named voters voted by a substitute, which appears from the polling books offered in evidence.

He testified that when Morphy, Roger Lodged Ballots she could see the voter if he marked ballots, and if the voter marked a Democratic Ballot Morphy, Roger, the Democratic judge, could go into the booth with the voter alone, and if the voter marked a republican ballot, then the republican judge would go into the booth with the voter. This witness further testified that about 100 voters were marked and that the last name in the poll book at the close of the polls was Mary Ann, or like ETC. (taken from the poll book, (Magic's Exhibits I and X) all marks appeared upon the books. This same witness further testified that whenever there was a black square before the candidate Fanny's name, Democratic would vote in a cross, and that this was done 3 times, that one Democratic ballot, in particular, was marked with a red lead pencil not that on that ballot there was no mark in the square before Fanny's name, so Carbella put a cross in the square before the name of Fanny, and some somewhere called Carbella's attention to the fact that the first of the ballot was marked with a red lead pencil, Carbella erased the cross and he had made with the black pencil and took a red lead pencil and of his pocket and marked a cross in the same square with the red lead pencil.

There is evidence in the record by Christine Carter, a bookkeeping expert, who corroborated her opinion that the ballots had been tampered with, and she related not that the evidence supporting upon the face of the ballots showed they had been tampered with.

From the facts in the record it is evident there was evidence before the court that a number of voters in this particular precinct appeared in court and testified they did not report at the polling place and vote by marking a ballot on the day in question, and it further appears that there were many voters taken by a substitute, which appears from the polling books offered in evidence,

We are of the opinion that the court was justified in finding the respondents guilty, as appears from the order, and especially when we consider the further evidence that crosses were inserted in vacant squares before the name of Vacco, and that this was done eight times in the presence of the judges and clerks of the polling place after the polls had been closed and while the judges and clerks were engaged in canvassing the vote and preparing the returns to be delivered to the Election Commissioners.

While this evidence to which we have referred is in controversy, and the respondents each testified there was nothing unlawful done at the polling place on that day and that they tried to comply with the law, still the credibility of all the witnesses appearing before the court was passed upon and their testimony considered, and the court from the entire evidence entered the order appealed from.

It is contended by the respondents that the court erred in denying a change of venue after the petition and affidavit averring prejudice was filed in the County Court and after the court had considered the petition. Ch. 146, Sec. 1 of the Venue Statute, Smith-Hurd Illinois Revised Statutes, 1935, provides in substance for a change of venue,

> " * * * in any civil suit or proceeding in law or equity, * * * where either party shall fear that he will not receive a fair trial in the court in which the suit or proceeding is pending because * * * the judge is prejudiced against him * * *."

The question is raised whether under this provision of the act it was intended that in any civil suit or proceeding in law or equity a change of venue should be granted. It has been held by our Supreme Court in the case of <u>The People</u> v. <u>Kotwas</u>, 363 Ill. 336, that a proceeding under section 13 of article 2 of the City Election act against judges and clerks of election for contempt for any misbehavior

in their office is not a criminal proceeding in which a writ of error lies from the Supreme Court to the Appellate Court under section 11 of article 6 of the constitution, and the court in that case cites with approval the case of The People v. Panchire, 311 Ill. 622, and quotes therefrom as follows:

> "While contempts are generally spoken of as offenses, yet by the greater weight of authority and better reasoning they are in reality sui generis, - they are quasi crimes or offenses. The proceeding is in the nature of a criminal proceeding, but they are not crimes within the meaning of the statute defining misdemeanors, or the constitution requiring that the accused shall have the right of trial by jury. The rules regarding the trial of crimes by information or indictment are not applicable to proceedings for contempt."

In the case of McKinley v. McIntyre, 360 Ill. 382, the Supreme Court held that a suit to contest an election to office was neither an action at law nor in equity, The instant case being one in which the respondents were charged with contempt, as we have already stated in the opinion, it is plain that it does not come within the provision of the Change of Venue Act, which provides that in order to come within its provision it must be a civil suit or a proceeding in law or equity. Therefore, the court properly denied the petition for a change of venue filed in the case here on appeal.

The question was also raised by these respondents that the court in entering the order here on appeal acted on oral testimony but disregarded the statute and acted on both oral and documentary proof. While the statute provides for oral testimony, it appears from the evidence in the record that the documentary proof received by the court was in corroboration of the evidence of witnesses who testified orally, and it would be but a reasonable construction of the statute to say that while the court ~~xxxx~~ shall hear the oral testimony, it is not obliged to confine itself to just that testimony, but may consider in support of the proof documentary evidence such as was

in their office is not a wrongful transaction in which a writ of error lies from the Supreme Court to the Appellate Court under section 11 of article 6 of the Constitution, and the court in that case cites with approval the dicta of The People v. Lamphier, 171 Ill. 290, and quotes therefrom as follows:

"While equitable jurisdiction exists of an attorney, yet by the greater weight of authority and better reasoning they are in reality and essence, - they are mere writs or pleadings. The proceeding is in the nature of a criminal prosecution, but they are not crimes within the meaning of the statute defining misdemeanors, or the constitution requiring that the accused shall have the right of trial by jury. The rules regarding the trial of crimes by indictments or information are not applicable to proceedings for contempt."

In the case of Mulvey v. Sullivan, 201 Ill. 344, the Supreme Court said that a writ to compel an election to office was neither an action at law nor in equity. The instant case being one in which the respondents were charged with misconduct, as we have already stated in the opinion, it is quite plain it does not come within the provision of the Chapter of Ohio law, which provides that in order to come within the provision it must be a civil suit or a proceeding in law or equity. Therefore, the court properly denied the petition for a mandamus of Ohio Tilet in the view here on appeal.

The petitioner has also raised by these proceedings that the court in entering the order here on appeal acted on oral testimony but disregarded the stenographic notes in both oral and documentary proof. While the statute provides for oral testimony, it appears from the evidence in the record that the documentary proof received by the court was in corroboration of the evidence of witnesses who testified orally, and it would be but a reasonable construction of the statute to say that while the court xxxx shall the oral testimony, it is not obliged to notice itself in just that manner, but may consider in support of the oral testimony evidence such as was

introduced in this case. This is exemplified by the fact that it was necessary to consider such evidence, when there were witnesses who testified ballots had been changed by markings, and impostors had voted in place of voters who had registered in the precinct, and the documentary records of the election were such as to establish the fact that impostors voted for and in place of the registered voters in the precinct - all of which is clear from the evidence. It would be an unreasonable construction of the provision of the statute to restrict the proof where the oral testimony indicates a violation of the law has taken place, and especially where, as in this case, the testimony is corroborated by the public records on file in the Election Commissioner's Office.

In the case of People, ex rel. Rusch v. Savaiano, 293 Ill. App. 515, this court upon the question of whether evidence other than oral could be received and considered by the court, said:

> "It is also urged by counsel for respondents that the court had no right to recount the ballots, nor to consider the tally sheets, ballots and other documents and papers used in the election, showing the returns made by these officials, but that under the statute, nothing but oral evidence should have been received upon the charge made. The same counsel, in People ex rel. Rusch v. Williams, supra, in the county court and here, urged this same point, and this court there said:
>
> 'It is also said that the trial court had no authority to recount the ballots as the proceedings contemplate a hearing "on oral testimony" exclusively. We do not read the statute as limiting the character of evidence which may be submitted in this proceeding. It is self-evident that the court must, in passing upon the charges, consider the tally sheets, ballots, or any other documentary or oral evidence from which the court may determine the innocence or guilt of the parties accused."

It may be noted in passing that the respondents themselves in the instant case offered in evidence the documentary proof, consisting of ballots cast at the primary, where the respondents acted as judges and clerks of election and were charged with contempt of court, which charge is now in this court for consideration.

introduced in this case. This is evidenced by the fact that it was necessary to consider such evidence, that there were allegations who statistical values had been changed by mistake, and inaccurate had votes in place of votes who had registered in the precinct, and the accompanying remarks of the election who came to so swearing the fact that inaccurate votes had gone in place of the registered votes in the precinct - all of which is clear from the evidence. It would be an contradictory construction of the provisions of the statute to construe the court where the oral testimony indicates a violation of the law has taken place, and especially where, as in this case, the testimony is corroborated by the public records on file in the election commissioner's office.

In the case of People, ex rel. Judd v. Erickson, 250 Ill. 499, this court upon the question of admitting evidence where the ballots would be received and considered by the court, said:

"It is also urged by counsel for appellants that the court had no right to examine the ballots, nor to consider the fully shown, despite the other documents and papers used in the election, counting the returns made by these officials, but that under the statute, nothing but oral evidence should have been received upon the contest suit. The same counsel, in People ex rel. Dash v. Williams, supra, in the county court and here, urged this same point, and this court held:

'It is also said that the trial court had no authority to recount the ballots as the contestee contemplate a mandamus 'an civil jurisdiction' conclusively. We do not read the statute as limiting the authority of evidence which may be submitted in this proceeding. It is self-evident that the court must, in trying upon the merits, consider the fully shown, ballots, or any other documentary or oral evidence that which the court may introduce the innocence or guilt of the parties involved.'

It may be noted in passing that the concurrence concerning in the instant case effort to evidence the documentary proof, consisting of ballots that at the primary, which in respondents were in judges and clerks of election and were marked with contents of court, which charge is not in this court for consideration.

In the case of People ex rel. Busch v. Savaiano, supra from which we have just quoted and in which appeal was denied by the Supreme Court, we held upon a like question that misconduct on the part of judges and clerks of election is a contempt of the county court in the nature of a criminal contempt, the statutory penalty provided being imposed to vindicate the authority of that court with respect to matters connected with holding of elections and that court may properly deny request for change of venue in prosecution for alleged misconduct of the judges and clerks of election who for that purpose are officers of the court (Ill. State Bar Stats. 1935, ch. 46, par. 267, ch. 146, par. 1 et seq.; Jones Ill. Stats. Ann. 43.277, 107.316 et seq.).

For the reasons stated the judgment of the court is affirmed.

JUDGMENT AFFIRMED.

HALL, J. CONCURS,

MR. JUSTICE DENIS E. SULLIVAN SPECIALLY CONCURRING:

While I agree with the decision reached, I do not agree with all that is said in the foregoing opinion.

In the case of Jackson et ux., Young v. Hutchins, Judge from which we have just quoted and in which opinion was joined by the Supreme Court, in full agreement, a like question was considered on the part of judges non sterio of elections in a contest of the county court in the matter of a statical contest, the statutory penalty provided being imposed to violate the authority of that court with respect to matters concerned with holding of elections and that court may properly issue subpoenas for attendance of witness in prosecution for alleged misconduct of the judges and clerks of elections who for that purpose are officers of the court (III. State Bar Stats. 1951, ch. 46, par. 107, th. 118, par. 1 et seq.; Jones Ill. Stats. Ann. 43.177, 107.118 et seq.).

For the reasons stated the judgment of the court is affirmed.

Judgment affirmed.

DAVIS, J. dissenting.

Mr. Justice Davis, J. delivered dissenting opinion:

While I agree with the decision rendered, I do not agree with all that is said in the dissenting opinion.

39819

JOSE CASTRO,

(Plaintiff) Appellant,

v.

EDWARD SMUVANSKY,

(Defendant) Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

296 I.A. 639

MR. PRESIDING JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the plaintiff from a judgment entered May 20, 1937, upon the overruling of a motion by the plaintiff to vacate an order entered by the court vacating a default judgment for the plaintiff entered on November 27, 1936.

The plaintiff filed a suit to recover from the defendant, and from his statement of claim it appears that on January 12, 1935, he purchased from the defendant a Cadillac car for $75.00 in cash and a second-hand Studebaker vehicle of the value of $65.00 then the property of the plaintiff, and paid the defendant $40 in cash and delivered to him his promissory note for $35, payable 30 days after date, together with the Studebaker car; that thereafter he paid $10.00 on account.

The defendant was served with a summons and a copy of the statement of claim filed in this action, and upon the return day the defendant defaulted for failure to appear in court to defend. On November 27, 1936, a judgment by default was entered for the plaintiff, and on December 8, 1936, the defendant was personally served with an execution. On January 29, 1937, sixty-one days after the judgment was entered and fifty days after being served with an execution, the defendant filed a petition asking the court to vacate the default judgment.

The plaintiff filed an answer to the petition, and thereafter the defendant filed a second petition without notice to the plaintiff, and the court vacated the judgment of November 27, 1936 against the defendant.

STATE

DADE COUNTY.

(PLAINTIFF) APPELLEE,

V.

ERNEST BRAUNER,

(DEFENDANT) APPELLANT.

29 I.A. 639

MR. PRESIDING JUSTICE TUNNY DELIVERED THE OPINION OF THE COURT.

This is an appeal by the plaintiff from a judgment entered May 20, 1937, upon the overruling of a motion by the plaintiff to vacate an order entered by the court granting a default judgment for the plaintiff entered on October 27, 1936.

The plaintiff filed a suit to recover from the defendant, and from his sureties of claim it appears that on January 12, 1930, he purchased from the defendant a Cadillac car for $72.00 in cash and a second-hand Studebaker valued at the price of $50.00 from the property of the plaintiff, and paid the defendant $40 in cash and delivered to him his promissory note for $30, payable 30 days after date, together with the Studebaker car; that thereafter he paid $10.00 on account.

The defendant was served with a summons and a copy of the statement of claim filed in this action, and upon the return day the defendant obtained for filing to appear in court to defend. On November 27, 1936, a judgment by default was entered for the plaintiff, and on December 8, 1936, the defendant was personally served with an execution. On January 22, 1937, sixty-one days after the judgment was entered and fifty days after being served with an execution, the defendant filed a petition asking the court to vacate the default judgment.

The plaintiff filed an answer to the petition, and thereafter the defendant filed a second petition without notice to the plaintiff, and the court vacated the judgment of November 27, 1936 against the defendant.

Thereafter on May 20, 1937, the plaintiff filed a motion supported by an affidavit to vacate the order vacating the judgment and for leave to file an answer to the second petition of the defendant. The court allowed the plaintiff to file an answer to the second petition and overruled plaintiff's motion to vacate the judgment of November 27, 1936, entered against the defendant by default. The plaintiff elected to abide by his answer, and the court dismissed the suit.

On April 30, 1937, without notice to the plaintiff, the defendant presented in open court a second petition to vacate, which was entered on the half sheet of the court as having been filed by the clerk on April 21, 1937, and in which petition the defendant petitioner, under oath, states that on November 27, 1936, a judgment in the sum of $200 was entered in the above cause with a special finding of malice and capias to issue. Petitioner also states that on August 8, 1936, the petitioner was served with summons and said summons was in the name of Smuvawsky; that the correct name of petitioner is Smurawski; that nevertheless, on August 11, 1936, the return day of the summons, he appeared in Room 1109 in the City Hall and filed his appearance pro se with the clerk of the court, and after filing his appearance, the clerk returned it to him advising him that it would not be necessary to leave the appearance, and that the summons was issued in an incorrect name.

It appears from the petition that the defendant was a police officer in the City of Chicago, and at the time of the service of the execution, he was engaged in fulfilling police duties. Petitioner states that he has a full and complete defense to the action; that the automobile mentioned in the statement of claim was never in fact delivered to the plaintiff by the petitioner, but that the automobile was stored in a public garage, and the storage charges were paid by

Thereafter on May 20, 1927, the plaintiff filed a motion supported by an affidavit to vacate the order granting the judgment and for leave to file an answer to the amended petition of the defendant. The court allowed the plaintiff to file an answer to the amended petition and overruled plaintiff's motion to vacate the judgment of December 27, 1926, whereupon plaintiff the defendant by default. The plaintiff elected to file an answer, and the court dismissed the suit.

On April 20, 1927, without notice to the plaintiff, the defendant commenced in this court a second petition to vacate, which was entered on the call docket of the court as having been filed by the clerk on April 23, 1927, and in which petition the defendant petitioner, under oath, states that on November 27, 1926, a judgment in the sum of $200 was entered in the court upon his a special finding of notice and engage to issue. Petitioner also states that on August 5, 1926, the petitioner was served with summons and said summons was in the usual of Garnishee; that the correct name of petitioner is Martinez; that interpleader, on August 21, 1926, the return day of the summons, he appeared in Room 1109 in the City Hall and filed his appearance and at the clerk of the court, and after filing his appearance, the clerk announced it to his attorney. He then it would not be necessary to have the appearance, and that the summons was issued in an improper name.

It appears from the petition that the defendant was a police officer in the City of Chicago, and at the time of the service of the summons, he was engaged in fulfilling police duties. Petitioner states that he has a full and complete defense to the action; that the automobile mentioned in the statement of claim was never in that delivered to the plaintiff by the petitioner, but that the automobile was stolen in a public garage, and the garage keeper was paid by the defendant in the second petition, and that petitioner

the petitioner, and that the plaintiff was to pay for the automobile in installments at certain specified times; that default was made in the payments, and that according to an agreement between them, the car was sold by the defendant.

This in substance was the second petition filed by the defendant, and as we have stated in this opinion, was filed without notice to the plaintiff.

On May 20, 1937, the court granted to the plaintiff leave to file an answer, but denied plaintiff's motion to vacate the judgment entered for the defendant upon the facts stated in the second petition.

In discussing the merits of the defendant's petition regarding whether or not he was properly served with summons, it is to be noted that he received a properly served summons, and the only point made is that the name in the summons was not properly spelled, and that notwithstanding this he did appear in the Municipal Court on the return day and file his appearance with the Clerk, which he states was returned to him because the files were missing and the name was not properly spelled.

The provision which governs in actions of this kind and is controlling is stated in Illinois Rev. Stats. 1937, Ch. 37, Sec. 21, Par. 376, and is as follows:

> " * * * "Every judgment, order or decree of said court final in its nature shall be subject to be vacated, set aside or modified in the same manner and to the same extent as a judgment, order or decree of a circuit court during the term at which the same was rendered in such circuit court, provided a motion to vacate, set aside or modify the same be entered in said Municipal Court within thirty days after the entry of such judgment, order or decree. If no motion to vacate, set aside or modify any such judgment, order or decree shall be entered within thirty days after the entry of such judgment, order or decree, the same shall not be vacated, set aside or modified excepting upon appeal or writ of error, or by a bill in equity, or by a petition to said Municipal Court setting forth grounds for vacating, setting aside or modifying the same, which would be sufficient to cause the same to be vacated, set aside or modified by a bill in equity: Provided however, that all errors in fact in the proceedings in such case, which might have been corrected at common law by the

the petitioner, and that the plaintiff was to pay for the necessaries in instalments at monthly specified times; that default was made in the payments, and that nothing is an agreement between them, that was sold by the defendant.

This is substance was the second petition filed by the defendant, and as no such error in this opinion, was filed without notice to the plaintiff.

On July 30, 1927, the court granted to the plaintiff leave to file an answer, but denied plaintiff's motion to vacate the judgment entered for the defendant upon the first error stated in the second petition.

In considering the merits of the defendant's petition regarding whether or not he was properly served with summons, it is to be noted that he received a properly served summons, and the only point made is that the copy in the summons was not properly sealed, and that notwithstanding this he did appear in the municipal Court on the return day and file his appearance with the clerk, which he states was prompted to his knowledge the files were sealed and the same was not properly sealed.

The constitution which governs in matters of this kind and in contradiction is stated in Illinois Ann. Stats. 1927, ch. 77, Sec. 21, par. 27b, and is as follows:

" * * * Every judgment, order or decree of such court that in the return shall be subject to be vacated, set aside or modified in the same manner and by the same method as a judgment, order or decree of a circuit court during the term in which the same was rendered in such municipal court, provided a motion to vacate, set aside or modify the same be filed in such municipal court within thirty days after the entry of such judgment, order or decree. If no motion be made, or if the motion be denied, or if a judgment, order or decree shall be entered sitting forth the entry of such judgment, order or decree, the same shall not be vacated, set aside or modified thereafter upon account of any error, or by a bill in equity, or by a petition to set aside judgment, but petition must be filed for rehearing, setting aside or modifying the same, which shall be filed within the same time to be vacated, set aside or modified by a bill in equity: Provided however, that all errors in fact in the proceedings in such case, which might have been corrected if brought up by the

writ of error coram nobis may be corrected by motion, or the judgment may be set aside, in the manner provided by law for similar cases in the circuit courts."

From the petition of the defendant it is clear that he was the proper person to be served and was served as stated in the petition, and that he appeared on the day his appearance was required in the Municipal Court by reason of this service of summons. Admission in the petition that he was the proper defendant is apparent, and he seeks to set forth an alleged defense to plaintiff's action. He does not come within the statute which provides that the court has jurisdiction if such motion is made to vacate the judgment entered in the Municipal Court within 30 days after the entry of the judgment, and it is clear that such motion was not made until 61 days after the judgment was entered, and not until 50 days after defendant was served with an execution did he file his petition seeking to have the court vacate the default judgment. It is to be noted from the petition that the defendant did not exercise due diligence in appearing and setting up his defense, if he had one, at the time he filed his petition after the 30 days had expired from the date judgment was entered on November 27, 1936.

In filing this petition the defendant started a new suit to vacate the judgment entered upon failure of the defendant to appear at the time fixed in the summons served upon him, and there are certainly no equitable grounds upon which the court could act after the expiration of the 30 day limit. The authorities are clear that the only basis for a bill of equity is an allegation that the defendant was prevented from availing himself of fraud, accident or mistake, and used the highest degree of diligence to prevent fraud, accident or mistake. The Supreme Court has consistently held that where a party has been served with process and neglected to file his appearance and make defense, a court of equity is without jurisdiction to grant the relief prayed for.

writ of error coram nobis may be prosecuted by petition, or the judgment may be set aside, in the manner provided by law for similar cases in the circuit courts."

From the petition of the defendant it is clear that he was the county prisoner to be served and was served as stated in the petition, and that he appeared on the day his appearance was required in the municipal court by reason of this service of summons. Admission in the petition that he was the proper defendant is apparent, and he seems to set forth no alleged reason to disentitle action. He does not come within the statute which provides that the court has jurisdiction if such action is made to vacate the judgment entered in the municipal court within 30 days after the entry of the judgment, and it is clear that such action was not made until 31 days after the judgment was entered, and not until 30 days after defendant was served with an execution and he filed his petition seeking to have the court vacate the default judgment. It is to be noted from the petition that the defendant did not exercise due diligence in appearing and getting on his defense, if he had one, at the time he filed his petition after the 30 days had expired from the date judgment was entered on November 27, 1926.

In filing this petition the defendant thought a new suit to vacate the judgment entered upon failure of the defendant to appear at the time fixed in the process served upon him, and there was certainly no conclusive reason why the court could not after the expiration of the 30 day limit. The authorities are clear that the only basis for a bill of equity is the allegation that the defendant was prevented from exercising diligence of fraud, accident or mistake, and used the highest degree of diligence to prevent fraud, accident or mistake. The fundamental rule is consistently held that where a party has been served with process and neglected to file his pleadings and make defense, a court of equity is without jurisdiction to grant the relief prayed for.

In the case of Post Falls Lumber & Mfg. Co. v. Messer Lumber Co. 183 Ill. App. 309, this court held:

"Under the rules of the court it (plaintiff in error) was required to enter its appearance and to file an affidavit setting forth its defense by or before the return day of the writ, October 9, 1911, unless further time was given to file such affidavit. No appearance was filed by plaintiff in error until October 18, 1911, two days after judgment was entered, and no affidavit of defense was ever filed therewith, and no sufficient excuse was offered for this neglect. No other action was taken by plaintiff in error, until thirty days after judgment was entered, when plaintiff in error sought to have the judgment set aside. No diligence whatever was shown by plaintiff in error either in the matter of preparing the issues for trial, or in having the judgment vacated. Both diligence and merit must be shown to have a judgment by default set aside, and when it appears that the defaulted party, or his attorney, has failed to exercise due diligence to protect his rights it will not be held an abuse of discretion to refuse to vacate the judgment, however meritorious the defense offered may appear."

We think the judgment entered dismissing the plaintiff's action upon the answer of plaintiff to the defendant's petition was erroneous, and for the reasons stated, the judgment dismissing plaintiff's case is set aside and the cause reinstated. The order of the court setting aside the judgment by default, was also erroneous, and based upon the record as we have it before us and for the reasons stated, judgment is entered in this court for the plaintiff for $200, the amount of the judgment entered in the trial court.

JUDGMENT FOR THE DEFENDANT SET ASIDE AND
JUDGMENT HERE FOR THE PLAINTIFF FOR $200.

DENIS E. SULLIVAN AND HALL, JJ. CONCUR.

In the case of [illegible] v. [illegible], v. [illegible] [illegible], 1xx Ill. App. 2d, this court held:

"Under the rules of the court if plaintiff in error) was required to enter its appearance and to file an affidavit setting forth its grounds for or before the return day of the writ, October 5, 1971, unless further time was given to file such affidavit. No [illegible] was filed by plaintiff in error until October 12, 1971, two days after judgment was entered, and no affidavit of [illegible] was ever filed therewith, nor do sufficient excuse was offered for this default. In other words was taken by plaintiff in error, until twenty days after judgment was entered, when plaintiff in error sought to have the judgment set aside. No diligence however was shown by plaintiff in error either in the matter of preserving the issues for trial, or in having the judgment vacated. Both diligence and merit must be shown to have a judgment by default set aside, and when it appears that the defaulting party, or his attorney, has failed to exercise due diligence to protect his rights it will not be held an abuse of discretion to refuse to vacate the judgment, however meritorious the defense alleged may appear."

In which the Appellate court upheld the plaintiff's motion upon the answer of plaintiff to the defendant's petition was frivolous, and the trial court granted, the judgment dismissing plaintiff's suit in error in the trial court. The order of the court setting aside the judgment by default, was also erroneous, and based upon the record as it had it before us and for the reasons stated, judgment is entered in this court for the plaintiff for $800, the amount of the judgment entered in the trial court.

Judgment for the defendant in error and against the plaintiff in the trial court.

Judgment for the plaintiff in error.

Mills v. Mutual Life Ins. Co., supra.

39857

EDITH MAY ASHBURN,

(Plaintiff) Appellant,

v.

F. W. WOOLWORTH COMPANY, a Corporation,

(Defendant) Appellee.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

296 I.A. 639

MR. PRESIDING JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the plaintiff from a judgment for the defendant in a personal injury suit. The plaintiff brought an action at law against the defendant to recover damages for injuries sustained by her. The case was tried before the court and a jury, and at the close of plaintiff's case the trial court directed a verdict in favor of the defendant, and entered judgment upon the verdict.

The amended declaration alleges that prior to and on to-wit, the 5th day of April, A. D. 1933, defendant operated and maintained a store or salesroom at 6314 South Halsted Street, Chicago, which the defendant invited the general public to enter for the purpose of examining, inspecting and purchasing goods, wares and merchandise, and therein maintained certain stairs and stairways at the front and rear of said store for the use of the public and its patrons; that the defendant negligently and carelessly caused the stairway at the rear of said store, which was maintained by the defendant for its patrons to ascend and descend from the second floor of said store, to be littered with scraps and pieces of slippery paper, rendering the stairs unsafe to be walked upon, which unsafe condition was or ought to have been known to the defendant, but was unknown to the plaintiff.

It further alleges that the plaintiff was lawfully and rightfully in said store of the defendant and had gone up the front stairway provided for that purpose to the second floor of the store of the defendant to look at merchandise which the defendant had on display there for sale, and with a view to making purchases, and was

coming down the rear stairway so maintained by the defendant, in the exercise of ordinary care for her own safety, and while so doing she unavoidably slipped upon said piece or pieces of slippery paper littering the stairs near the top of said stairway, by reason whereof her foot slipped and she was thrown with force and violence to the landing below, and she thereby and as a direct result thereof, sustained severe and permanent injuries.

The defendant filed a plea of not guilty to the amended declaration of the plaintiff.

It appears from the evidence that on Arpil 5, 1933, the plaintiff visited the defendant's store with her small child, who was past two years of age, for the purpose of purchasing merchandise; that she ascended from the first floor to the second and while on the second floor took her child to the counter fixed up with Easter bunnies, that she might see them, after which the plaintiff started downstairs in the rear of the store to the main floor; that on the stairway in the back of the store were two railings to be used by persons ascending and descending this stairway; that there is a landing, and the stairs go to the landing and finally reach the main floor of the store; that the plaintiff when she reached this stairway had the child by the hand and was walking slowly, her husband following her; that plaintiff started to walk downstairs and when she reached the third step her foot slipped, threw her over on the side and then she struck her head and struck every step until she reached the landing. At the time, the baby was with her and she held her by the left hand. The child was between her and the railing as they were walking. Before the plaintiff fell she did not see any foreign substance on the steps, and there was evidence of the plaintiff that her right foot slipped and threw her and that the shoes she was wearing at the time were nurses' shoes with a

during does the river stairway as maintained by the defendant, in the exercise of ordinary care for her safety, and while in going and departing from said place, or crossing of slippery paper littering the stairs near the top of said stairway, by reason thereof her foot slipped and she was thrown with force and violence to the landing below, and she severely and in a grave manner injured, sustained serious and permanent injuries.

The defendant filed a plea of not guilty to the amended declaration of the plaintiff.

It appears from the evidence that on April 8, 1899, the plaintiff visited the defendant's store with her small child, who was past two years of age, for the purpose of purchasing merchandise; that she ascended from the first floor to the second and walk on the second floor back her way to the counter fixed to with large varnish, that she slept one time, after which the plaintiff entered somewhat in the rear of the stairs to the said floor; that on the stairway in the best of the store were two railings to be used by persons ascending and descending this stairway; that there is a landing, and the stairs go to the landing and directly round the main floor of the store; that the plaintiff when she reached this stairway had the child by her hand and her walking slowly, her husband following her; that plaintiff started to walk downstairs and when she reached the third step her foot slipped, there her arm go to the side and then she grabbed and clutch every way until she reached the landing. At the time, the baby was with her and she held her by the left hand. The child was between her and the railing as they were walking. Before the plaintiff fell she did not see any foreign substance on the stairs, and there was evidence of the plaintiff that her right foot slipped and throw her and that the shoes she was wearing at the time were worned down with a

low heel - perhaps an inch high; that as a result of this fall the plaintiff was severely injured.

As to the condition of the stairway, the plaintiff's husband, John Ashburn, was a witness. He described the accident and the fall of his wife. It appears from his evidence that from the top of the stairway to the landing above the first floor there were 10 or 12 steps in the flight where she fell; that the plaintiff slipped on the third step from the top; that the steps were 6 feet wide, and she was about middle way of the step on the left side; that the little girl was on the right, holding the banister as she was going down; that when plaintiff fell she jerked the little girl from the banister, and they both went down together; that immediately after the plaintiff fell, her husband, John Ashburn, saw green paper on the steps such as is used for decoration at Easter; that he saw it on the steps, upon the platform and upon the floor where he was standing, and there was paper on three or four steps, from the third step to the top. He described the paper as being strands of paper, "just little strands, maybe three or four pieces together, a kind of wax paper, green paper cut in long strips." He further testified that he was on the top of the landing when his wife fell, and that was when he saw this paper.

There was also the evidence of a witness who testified that she was present in the Woolworth Store and saw the plaintiff after she fell; that at the time of the accident she was eating lunch at the counter in the back of the store on the ground floor; that she heard some screaming and went to see what it was about; that she saw the plaintiff on the floor on the landing of the stairway in the rear of the store, and she also saw Mr. Ashburn and the child. The witness testified she had been upstairs just before she came down to eat lunch - that she came downstairs not more than ten minutes before she

2

for Noel - perhaps an hour ago; then as a result of this fall the plaintiff was severely injured.

As to the condition of the gateway, the plaintiff's evidence, also unknown, was - unknown. He described the condition and the fall of the girl. It appears that his evidence came from the top of the gateway to the landing above the first floor there was 10 or 12 steps in the flight where the fall; then the plaintiff slipped on the stairs when her foot got; then the plaintiff slipped on the stairs when her foot got; then the stone was a bit slippery; and the was about middle way of the step on the left side; then the little girl was on the right, holding the children so she was going down; then when plaintiff that she turned the little girl from the bannister, and then she was at some beginning; then immediately after the plaintiff fell, her husband, John Thomson, was going down on the stairs and he ran to assist the plaintiff; then he was if on the stairs, when the plaintiff and when the floor where he was standing, and there was water on floor or door stone, from the baby step to the top. He described the water as being occasion of injury, "just little stones, water came on that because supposed, - that at was rainy, gates came and in back street." In further supplied that he was in the act of not landing when his wife fell, and that was when he saw this injury.

There was also the evidence of a witness who testified that she was present in the tenement where was the plaintiff after the fall; that at the time of the accident she was sitting beside of the counter in the back of the shop in the ground floor; that she saw some screaming and went to see what it was about; that she saw the plaintiff on the floor in the landing at the entrance in the back of the store, and the girl was by, crying and her child. The witness testified she had been warning just before the same days to get lamps - that the rear tenements had more than two minutes before the

heard the scream and went over and saw Mrs. Ashburn; that at the time she came downstairs she saw "green stuff they pack the Easter baskets with", on the stairs; that this paper was on the second floor and on the stairs - all the way down the stairs in little pieces, but mostly near the top; that this paper is used to represent grass; is wax paper, green and in strips; that these pieces were scattered around almost everywhere; that the paper was not crepe paper; it was wax paper.

The defendant contends that the plaintiff had failed to prove her case as alleged in her declaration, and calls our attention to the fact that plaintiff's case is based upon her claim of having slipped upon pieces of paper that rendered the stairway of the defendant unsafe, and that this unsafe condition was or ought to have been known by the defendant and was unknown to the plaintiff, who was in the exercise of due care. There is no claim that the stairway was defective and the evidence tends to show that the stairway was well lighted.

The defendant stresses the point that there is no evidence in the record that the plaintiff in descending and using the stairway in question at the time of the accident was caused to slip by reason of the wax paper on the stairway. As we have previously stated, the evidence before the court was that the floor was littered with this green wax paper and the steps were covered with strips of the same, and the evidence would indicate that there was such paper on the landing where the plaintiff was picked up after she fell. The evidence is clear that the plaintiff was injured by her fall on this stairway; that the fall occurred during business hours of defendant's business; that the plaintiff was invited by the defendant, as was the general public, to enter the store and take advantage of the sale of merchandise dealt in by the defendant, and the plaintiff having been invited

board the square rod went over and was lost. Indeed; that is the time she even demonstrate she was "gross enough" they made the latter breakes with", on the evening; that this judge was at the second floor and on the stairs - all the way that the entire is little sheer, but mostly near the top; that this paper is used to refreshment green; is six inches, green and in stripe; that three sheets were scattered around sheet everywhere; that the paper was not cheap paper; it was wax paper.

The defendant contends that the plaintiff had failed to prove her case as alleged in her declaration, and calls our attention to the fact that plaintiff's claim is based upon her claim of having slipped upon pieces of paper thin resembling the stairway at the defendant's; and that this remark condition was or ought to have been known by the defendant and was unknown to the plaintiff, who was in the exercise of due care. There is no claim that the stairway was defective and the evidence tends to show that the stairway was well lighted.

The defendant strenuous the point that there is no evidence in the record that the plaintiff in descending and using the stairway in question at the time of the accident was caused to slip by reason of the wax paper on the stairway. In no case mentionably stated, the evidence before the court was that the floor was lighted with this green wax paper and the whole room covered with strips of the same, and the evidence could indicate that there was much paper on the landing where the plaintiff was claimed to slip the fall. The evidence is clear that the plaintiff was injured by her fall on this stairway; that the fall occurred during business hours of defendant's business; that the plaintiff was invited by the defendant, as was the general public, to enter the store and take advantage of the sale of merchandise dealt in by the defendant, and the plaintiff having been invited

to step into the store for the purpose of transacting such business as she had in mind, it was the duty of the defendant to furnish and maintain the aisles of the store in a reasonably safe condition for the safety of the plaintiff and other patrons of the store.

It has been held by this court in Dowling v. McLean Drug Co. 248 Ill. App. 270, that it was not failure on the part of the plaintiff to exercise due care in assuming that there were no obstructions in her path, neither was it failure to exercise due care in not looking upon the floor for obstructions which she unexpectedly encountered. The plaintiff was walking along a passageway which led to the stairway and was invited to make use of this stairway. Now, as to whether the paper littered on the stairway was there for a sufficient length of time to give the defendant an opportunity to remove it, is not in the record, for the reason that the defendant made a motion at the close of plaintiff's case for the court to instruct the jury to find the issues for the defendant, and the court in considering this motion gave as his reason that there was no evidence that the plaintiff slipped because of the paper on the several steps; also passed upon the credibility of the witness and the weight of the evidence in stating that he believed the testimony of the witness was useless and that she was grossly mistaken about or speculating upon the location of the stairway in the store, and that the plaintiff was guilty of contributory negligence when she failed to use the handrail at the side of the steps, but permitted her child to hold to this railing; and in commenting upon the doctor's testimony, stating that he went a long way in his testimony when he said that any blow would cause injury to the eye.

The law is well settled and is supported by numerous authorities that upon a motion for a directed verdict, such as made by the defendant in the instant case, the court is to consider

to step into the stairway for the purpose of transporting some furniture to the top floor, it was the duty of the defendant to furnish and maintain the stairs of the stairway in a reasonably safe condition for the safety of the plaintiff and other occupants of the stairs.

It has been held to this effect in Gaddis v. Johnson Dry Co. 241 Ill. App. 327, that if was not failure on the part of the plaintiff to exercise due care in assuming that there were no obstructions in her path, neither was it failure to exercise due care in not looking upon the floor for obstructions which was unexpectedly encountered. The plaintiff was walking along a passageway which led to the stairway and was invited to make use of this stairway. Now, as to whether the owner listened to the stairway was there for a sufficient length of time to give the defendant an opportunity to remove it, is not in the record, for the reason that the defendant made a motion at the close of plaintiff's case for the owner to instruct the jury to find the issues for the defendant, and the court in overruling this motion gave as its reason that there was no evidence that the plaintiff slipped because of the owner on the several stairs; also passed upon the credibility of the witness and the weight of the evidence in stating that he believes the testimony of the witness was credible and he greatly distrusted doubt or suggesting upon the location of the stairway in the place, and that the plaintiff was guilty of contributory negligence when she failed to see the handrail of the risk of the stairs, but maintained the child in said to this minimum and in commenting upon the doctor's testimony, stating that he made a lump up in the testimony when he said that the blow would cause injury to the eye.

The law is well settled and is supported by numerous authorities that upon a motion for a directed verdict, such as made by the defendant in the instant case, the court is to consider

plaintiff's evidence as true, and is not to consider the credibility of the witnesses or the weight of the evidence, and upon this ground we believe the court erred in granting the motion of the defendant for a directed verdict to find the issues for the defendant. Upon a like question the Supreme Court in the case of Devine v. Delano, 272 Ill. 166, said:

> "One of the principal questions argued by counsel is whether plaintiffs in error's negligence was the proximate cause of the deceased's injury and death. This was a question of fact to be submitted to the jury, and the rule applicable when considering a motion to direct a verdict has been frequently stated by this court. In McGregor v. Reid, Murdoch & Co., 178 Ill. 464, it was said (p. 471): 'All that the evidence tends to prove and all just inferences to be drawn from it in appellant's favor must be conceded to him. * * * Under the rule the evidence most favorable to appellant must be taken as true. * * * The credibility of the witnesses, the weight of the testimony, the drawing of the inferences of fact from facts proved, were all questions of fact for the jury to pass upon and not for the court to decide.' It was there held that the trial court erred in directing a verdict, and the cause was reversed. If there is in the record any evidence from which, if it stood alone, the jury could, without acting unreasonably in the eye of the law, find that all the material averments of the declaration have been proven, a verdict should not be directed. (Libby, McNeill & Libby v. Cook, 223 Ill. 206, and cited cases). There was no eye-witness to the accident, and hence the question whether deceased was knocked off by the post depends upon the inferences to be drawn from the testimony. Circumstantial evidence is the proof of certain facts and circumstances in a given case from which the jury may infer other connected facts which usually and reasonably follow according to the common experience of mankind. (State v. Avery, 113 Mo. 475; 11 Am. & Eng. Ency. of Law, - 2d ed. - 502, note.) In criminal as well as in civil cases a verdict may be founded on circumstances alone. (Slack v. Harris, 200 Ill. 96; Economy Light and Power Co. v. Sheridan, id. 439.) A greater or less probability, leading, on the whole, to a satisfactory conclusion, is all that can reasonably be required to establish controverted facts. (1 Greenleaf on Evidence, - 16th ed. - sec. 1; Commonwealth v. Webster, 5 Cush. 295; 11 Am. & Eng. Ency. of Law, - 2d ed. - 490.")

Then again, the Supreme Court in the case of Economy Light & Power Co. v. Sheridan, 200 Ill. 439, upon the question of insufficient evidence to justify the court in directing the jury to find the defendant not guilty, said:

> "There was no direct proof that the deceased came in contact with the electric light wire and that he received an electrical shock which threw him from the pole to the ground, but from the facts and circumstances proven it might fairly

plaintiff's evidence is true, and is not to consider the credibility of the witnesses or the weight of the evidence, and again this jurors so believe the court errs in directing the action of the defendant for a directed verdict in favor the defendant. Does a like question the jurors court in the case of Irvine v. [illegible], 172 Ill. 544, said:

"One of the principal questions argued by counsel is whether plaintiffs in error's testimony was the proximate cause of the deceased's injury and death. This was a question of fact to be submitted to the jury, and the rule applicable seem considering a motion to direct a verdict has been frequently stated by this court. In Chicago v. Pohl, Supreme C. Ill. 184, it was said (p. 211): 'If but the evidence tends to prove and all just inferences to be drawn from it to evidence favor must be considered in his. * * * Under the rule the evidence must favorable to evidence must be taken as true. * * * The credibility of the witnesses, the weight of the evidence, the drawing of the inferences of fact from facts proved, are all questions of fact for the jury to pass upon and not for the court to decide.' In the Chicago land that the trial court erred in directing a verdict, and the cause was reversed. If there is in the record any evidence from which, if it is taken alone, the jury could, without acting unreasonably in the eye of the law, find that all the material propositions of the declaration have been proved, a verdict should not be directed. (Chicago, Rock Island & Pacific R. Co. v. Lee, 200 Ill. 332, and cases cited). Though one or more witnesses in the case, and some the material witnesses described and knowledge of the case, testify upon the information to be drawn from the testimony. Circumstantial evidence is the proof of certain facts and circumstances in a given case from which the jury may infer other connected facts which usually and reasonably follow according to the common experience of mankind. (Hinze v. Chicago, 151 Ill. 269; 11 Am. & Eng. Corp. of Law, - 2d ed. - 406, note.) In criminal as well as in civil cases a verdict may be based on circumstances alone. (Lynch v. People, 200 Ill. 98; Spencer v. People, 224 Ill. 80; Pavlicek v. People, 16 Ill. App. 3 (proof of less probability, leaning, on the whole, to a satisfactory conclusion, is all that can reasonably be required in matters of contested facts. (1 Greenleaf on Evidence, - 13th ed. - sec. 1; Commonwealth v. Webster, 5 Cush. 295; 11 Am. & Eng. Corp. of Law, - 2d ed. - 420.)"

Then again, the Supreme Court in the case of Chicago Lake & Dover Co. v. Hamilton, 201 Ill. 432, upon the question of insufficient evidence to justify the court in directing the jury to find the defendant not guilty, said:

"There was no direct proof that the deceased came in contact with the electric light wire and thus to received an electrical shock which caused his death. The rule in the general, but from the force and circumstances proved it might fairly

and reasonably be inferred that such was the cause of his death. That such was the fact was susceptible of being proven by circumstantial as well as by direct testimony."

However, in the case before us there is evidence in the record which should have been submitted to the jury. While there is no direct evidence as to just what caused the plaintiff to slip when she fell on the stairway, there is evidence that this wax paper littered the floor and steps, and the question as to what caused the plaintiff to fall should have been submitted to the jury to determine whether from the facts and circumstances proven it might fairly and reasonably be inferred that the paper which littered the stairway the plaintiff was descending caused her to slip and thus sustain the injuries complained of.

Whether this green wax paper upon the floor, landing and steps as described was there for a sufficient length of time to give notice to the defendant was a question for the jury. That this wax paper was upon the floor and stairway was testified to by a witness who passed through the landing and stairway to a lunch counter in the store ten minutes before she heard the plaintiff scream after she had fallen in going down the stairway in question accompanied by her husband and child. This store was open to the public, and it was the duty of the defendant in the exercise of due care to keep this stairway and landing in a safe condition for use by patrons of the store. As before stated, this store was open to the public for the purpose of trading, and just how long before the plaintiff was injured, the floor, landing and stairway were in the condition described, is for a jury to decide, and as we have already indicated, we think there was sufficient evidence to warrant the court in submitting the facts to the jury.

For the reasons stated the judgment is reversed and the cause remanded for another trial.

REVERSED AND REMANDED.

DENIS E. SULLIVAN, J. CONCURS,

and reasonably be inferred that such was the cause of his death. That such was the fact was acceptable of being proven by circumstantial as well as by direct testimony.'

However, in the case before us there is evidence in the record which should have been submitted to the jury. While there is no direct evidence of the fact that caused the plaintiff to slip when she fell on the stairway, there is evidence that she was seen lifting the floor mat down, and the question as to what caused the plaintiff to fall should have been submitted to the jury to determine whether from the floor mat circumstances proven it might fairly and reasonably be inferred that the floor mat lifted and the stairway the plaintiff was descending caused her to slip and thus was the in jurious complained of.

Whether this proof was under cover the floor, landing and steps as described was there for a sufficient length of time to give notice to the defendant was a question for the jury. That this mat part was upon the floor and stairway was testified to by a witness who passed through the landing and stairway to a lower compartment in the store two minutes before she found the plaintiff screaming after she had fallen in going down the stairway in question unassisted by her husband and child. This store was open to the public, and it was the duty of the defendant in the exercise of the care to keep this stairway and landing in a safe condition for use by patrons of the store. As before stated, this store was open to the public for the purpose of trading, and just how long before the plaintiff was injured, the floor, landing and stairway were in the condition described, is for a jury to decide, and under any circumstances, we think there was sufficient evidence to warrant the court in submitting the facts to the jury.

For the reasons stated the judgment is reversed and the cause remanded for another trial.

Reversed and Remanded.

MAIN, J., DUFFIE, J., concur.

DISSENTING OPINION OF MR. JUSTICE HALL:

As recited in the opinion of the majority of the court, the declaration states that "the defendant negligently and carelessly caused the stairway at the rear of said store * * * to be littered with scraps and pieces of slippery paper, rendering the stairs unsafe to be walked upon, which unsafe condition was or ought to have been known to the defendant; also, that the plaintiff * * * was coming down the rear stairway * * * in the exercise of ordinary care for her own safety, and while so doing she unavoidably slipped upon said piece or pieces of slippery paper littering the stairs near the top of said stairway, by reason whereof her foot slipped and she was thrown with force and violence to the landing below."

In the case of Devine v. Delano, 272 Ill. 166, relied upon as authority for the reversal of the judgment, it is stated that "If there is in the record any evidence from which, if it stood alone, the jury could, without acting unreasonably in the eye of the law, find that all the material averments of the declaration have been proven, a verdict should not be directed."

In Davis v. South Side El. R. R. Co., 292 Ill. 378, the plaintiff slipped on a banana skin which lay on the stairway leading to an elevated railroad station, fell and was injured. After a trial in the Municipal Court of Chicago, plaintiff obtained a judgment, which, on appeal to the Appellate Court, was affirmed, and on appeal to the Supreme Court, was reversed, the Supreme Court holding that: (I quote from the syllabus) "An elevated railroad company is not liable for an injury to a passenger who slipped on a banana skin and fell on the stairway leading from the elevated station to the street, where the evidence does not show that the company had notice that the skin was on the stairway or that it had been permitted to be

DISCRETION DURING OF Dr. Justice Cole:

In reaching in the behalf of the activity of the court, the condition states that "the defendant negligently and carelessly caused the activity to fall over at left where * * * he be injured with across and jambs of activity house, rendering the state unsafe to be walked upon, which unsafe condition was or ought to have been known to the defendant; also, that the activity * * * was moving down the rear stairway * * * in the exercise of ordinary care for her own safety, and while so doing the unexpectedly slipped down with some or pieces of activity upon injuring the state down the rest of with activity, so causing damage and that slipped and she was thrown with force and violence to the landing below."

In the case of Jones v. Johnson, 171 Ill. 58, stating upon an analogy the rendered of her judgment, it is stated that "if there is in the record any evidence from which, if it stood alone, the jury could, without being unreasonably in the eye of the law, find that all the material statements of the declaration have been proven, a verdict should not be directed."

In Lyons v. North Side Ry. Co., 171 Ill. 179, the plaintiff slipped on a banana skin while up on the activity landing to an elevated railroad station, fell and was injured. After a trial in the municipal court of Chicago, judgment entered a judgment, which, on appeal to the municipal court, was affirmed, and on appeal to the Supreme Court, was reversed, the Supreme Court holding that: "It cannot from the evidence) "in discussed railroad company is not liable for an injury to a passenger who slipped on a banana skin and fell on the activity landing from the elevated station to the street, where the evidence did not show that the company and notice that the skin was on the activity or that it was been permitted to be

upon the stairway for a sufficient time to imply notice."

The only witness who testified as to the length of time the slips of paper which are supposed to have caused the accident in question, lay on the stairway, testified that she saw these scraps of paper on the stairway "not more than ten minutes before she heard plaintiff scream and went over and saw plaintiff lying where she had fallen."

The conclusion of the majority of the court, is arrived at by the indulgence in three presumptions, one upon the other. The first is that the paper alleged to have been on the stairway was of such character as would cause plaintiff to slip and fall, if stepped upon. The second presumption is that she did slip on the paper and fall. Neither of these presumptions is supported by any evidence. The third presumption is that the alleged unsafe condition was known by the defendant, as alleged in the declaration, or that the defendant, in the exercise of ordinary care, should have known that the paper was there. As stated, the only testimony bearing on this question is that the slips of paper were there not more than ten minutes before the witness heard plaintiff scream, which, of course, means little or nothing in the way of necessary proof. This might mean anything from one minute to ten.

For the reasons above stated, I can arrive at no other conclusion than that if the case had been submitted to a jury upon the evidence before it, a verdict for plaintiff could not be sustained upon the theory that all the material averments of the declaration had been proven. Therefore, I cannot concur in the opinion.

39865

RUTH M. LEWISON,
(Plaintiff) Appellant,
v.
ROBERT LEWISON,
(Defendant) Appellee.

APPEAL FROM
SUPERIOR COURT
COOK COUNTY.

296 I.A. 640[1]

MR. PRESIDING JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

The plaintiff appeals from a decree entered by the court on July 15, 1937, dismissing her bill of complaint for want of equity, and from the order of July 23, 1937, denying her motion to vacate the order of dismissal and to grant a new trial.

In her verified complaint for divorce against her husband, filed March 31, 1937, the wife charged him with wilful desertion without any reasonable cause, and that such desertion took place on March 10, 1936, and continued for more than one year, and prior to the filing of the complaint.

The defendant in his answer denies this charge and alleges that the plaintiff was the deserting party.

A hearing was had and the court entered the decree for the defendant from which this appeal is taken by the plaintiff.

The evidence shows that the wife was married to her husband on August 20, 1935; that there were no children born as a result of the marriage, and that they lived together until March 10, 1936, a period of about seven months; that during the pendency of the suit and until the trial of this action, the wife made no application for the payment of alimony or attorney's fees, and no such request was made in the trial court at the time of the trial.

From the evidence of the plaintiff it appears that during the first four months of their married life she and her husband lived with his parents, and thereafter moved to the North Side where they lived in an apartment which they rented under the name of Ray Roberts;

[illegible]

[illegible]

[illegible]

that during the short time they lived together, he did not work and he did not give her any money for her support; that he did not leave the apartment during this period; that there were arguments between the parties concerning his hiding from the police; that before she left him she stated to him that if he had not done anything wrong to give himself up and not keep in hiding; that in response to this request he told her that if she did not like the way he was doing things to get out and stay out; and at his request she gave him her jewelry, and since the separation he has never asked her to return to him.

It further shows from plaintiff's evidence that defendant told her he was in trouble and charged with robbery; that he had not worked during the last month they had lived together, and that he did not leave the apartment at any time.

The defendant testified, and during his examination the court asked these several questions regarding the support of his wife:

"The Court: What did you give her?

A. I gave her enough that anybody would need.

The Court: What did you give her?

A. Ten-fifteen dollars - what she wanted - what she needed.

Mr. Shulman: A week?

A. No. What she needed. Anything she came up and asked me for.

The Court: Were you in trouble?

A. I was in a little trouble at the time."

There is evidence in the record of a witness who testified she talked with the wife several times before the separation and that the wife told her she thought the best thing for her to do was to go to her mother's, and after the wife left she told the witness she was getting such good care at home she did not know whether she would go back or not. This is about the extent of the evidence.

that during the short time they lived together, he did not work and he did not give her any money for her support; that he did not leave the apartment during this period; that there were arguments between the parties concerning his taking from the valise; that before she left him she stated to him that if he was not done supplying money to give himself up and not keep on asking; that in response to this request he told her that if she did not like the way he was doing things to get out of the house; and at the moment she took her jewelry, and since the conversation he has never seen her or written to him.

It further appears from plaintiff's evidence that defendant told her he was in trouble and charged with robbery; that he had been working during the last month they had lived together, and that he did not leave the apartment at any time.

The defendant testified, and during his examination the court asked their several questions regarding the amount of his wife:

"The Court: What did you give her?

A. I gave her enough that anybody would need.

The Court: What did you give her?

A. Top-clothes dollars - what she wanted - what she needed.

Mr. Shulman: I ask

A. No. Just the needed. Anything she came to me asked me for.

The Court: Were you in trouble?

A. I was in a little trouble at the time."

There is evidence in the record of a witness who testified she talked with the wife several times before the separation and that the wife told her she thought the best thing for her to do was to go to her mother's, and after the wife left she told the witness she was getting back good care of home and did not know whether she would go back or not. This is about the extent of the evidence.

The court has passed upon the question as to the sufficiency of the evidence where the wife was ordered to leave, and did leave, to go to the protection of her mother's home, and in the case of Johnson v. Johnson, 135 Ill. 510, the court said:

> "If the husband voluntarily does that which compels the wife to leave him, or justifies her in so doing, the inference may be justly drawn that he intended to produce that result, on the familiar principle that sane men usually mean to produce those results which naturally and legitimately flow from their actions. And if he so intended, her leaving him would, in the case put, be desertion on his part, and not by the wife."

From the facts as they appear in the record it is apparent that the wife was forced to leave the defendant by his conduct, not alone from her testimony that she was obliged to leave him because he advised her if she did not like the way he was doing things to get out, but also from her evidence that this controversy was regarding his hiding from the police, and so far as furnishing support, it is apparent from the defendant's own evidence that he did not carry out his duty as a husband to support his wife in a manner compatible with his obligation to take care of her. On this question the case of Curlett v. Curlett, 106 Ill. App. 81 is pertinent. There the court said:

> "Where the husband has sufficient ability to support his wife but neglects to provide for her, when she is without fault, she is justified in leaving him and is entitled to a divorce for desertion if such separation continues for a statutory period."

The defendant contends that telling his wife if she was not satisfied with the conditions she could "get out and stay out" was not sufficient to constitute an ordering of her from the home or compelling her to leave. Well, he certainly directed that if she was not satisfied with what he was doing she was to get out, which of course she did, and if he was desirous of cohabiting with his wife he failed to ask her to return or attempt a reconciliation so she could return. On the contrary, it appears from the record that he was satisfied with the separation and that was the reason for his ordering her from the home.

The court was unsure that evidence of the publication of the writings where the wife was represented by James, and had lately to go to the publication of her husband's book, did in the case of Jackson v. Jackson, 108 Ill. 290, the court said:

"If the husband voluntarily uses her name in the publication, or permits the wife, or publishes her as he does, the inference may be justly drawn that is intended to indicate that result, or the ordinary criminals that a man can usually give to conduct those results which naturally and logically flow from such actions. And if he is an invalid, or leaving the county, if the case not, or otherwise on his part, use that by the wife."

From the facts in this article in the record it is apparent that the wife was forced to leave the defendant by the husband, and alone from her testimony that she was obliged to leave the message be advised her if she did not like the way he was using things to get out, but also from the evidence that this motivated the publication of the letter from the police, and by far in homicide account, it is evident from the defendant's own evidence that on his part every and his duty as a husband to account his wife in a manner compatible with his conditions in life and of her. In this question the case of Cooper v. Bailey, 107 Ill. 100, 93 is material. There the court said:

"Where the husband has sufficient ability to support his wife but neglects to provide for her, then she is without fault, she is justified in leaving him and is entitled to a divorce for desertion if such separation continues for a statutory period."

The defendant argued that leaving her with if she was but satisfied with the conditions and would 'get out and stay out' was not sufficient to constitute an abandoning of her from his home or compelling her to leave. Well, we certainly believe that if she was not satisfied with what he was doing in the to get out, which, of course she did, and if he was desirous of reconciling with his wife he failed to ask to return or attempt a reconciliation so she could return. In the meantime, it appears from the record that he was aware that the separation and that the reason for his criminal act here from the home.

The record without doubt shows that he did not furnish a home for his wife, nor did he explain why he did not provide for her in the manner a husband should.

We believe that the court erred, and the decree entered is reversed and the cause remanded with directions to the court to hear the cause upon its merits.

REVERSED AND REMANDED.

HALL AND DENIS E. SULLIVAN, JJ. CONCUR.

39882

FRANK S. AYRES, Executor of the Last Will and Testament of HARRIET C. LARK, Deceased, (Plaintiff) Appellant, v. HARRIET W. McKELLAR, (Defendant) Appellee.	)	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

296 I.A. 640

MR. PRESIDING JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the plaintiff as executor of the last will and testament of Harriet C. Lark, deceased, from a judgment entered for the defendant upon a hearing before the court without a jury.

The plaintiff instituted suit to recover from Harriet W. McKellar for money borrowed by the defendant and her husband, Charles W. McKellar from Harriet C. Lark, in her lifetime. Plaintiff's sworn statement of claim filed September 24,1936, alleges the due appointment and qualification of Frank S. Ayres, as executor of the estate of Harriet C. Lark, deceased; that on or about March 21, 1929, the defendant and her husband borrowed from said Harriet C. Lark, in her lifetime, $1,000; that said sum of money was loaned and delivered, and it is alleged that receipt thereof was acknowledged in writing; that no part has been repaid, and that the sum of $1,000 with interest at 6% per annum from March 21, 1929, was due from the defendant, and that Charles W. McKellar died after the loan of said sum of money.

Defendant's sworn amended answer was filed November 24, 1936, alleging that said plaintiff was not the qualified and appointed executor of Harriet C. Lark, deceased; that the defendant did not borrow the money as alleged in plaintiff's statement of claim; that she did not borrow any sum of money from the said Harriet C. Lark, and that she is not indebted to Harriet C. Lark or to the plaintiff herein as executor of the last will and testament of Harriet C. Lark, deceased; and further, that the claim of the plaintiff is barred by

Frank E. Little, executor of the last will and testament of Dorothy O. Lark, deceased,	Appeal from
(Plaintiff) Appellee,	Superior Court
v.	of Suffolk.
Harriet S. Swallow,	
(Defendant) Appellee.	

29 L.A. 640

BK. (DISSENTING OPINION GIVES DISSENTING OPINIONS OF THE COURT).

This is an appeal by the plaintiff as executor of the last will and testament of Dorothy O. Lark, deceased, from a judgment entered for the defendant upon a demurrer before the court without a jury.

The plaintiff instituted suit to recover from Harriet S. Swallow for money borrowed by the defendant and her husband, Charles S. Swallow from Dorothy O. Lark, in her lifetime. Plaintiff's sworn statement of claim filed September 14,1928, alleges the due appointment and qualification of Frank E. Little, as executor of the estate of Dorothy O. Lark, deceased; that on or about March 21, 1926, the defendants and her husband borrowed from said Dorothy O. Lark, in her lifetime, $1,000; that said sum of money was loaned and delivered, and it is alleged that twenty thereof was acknowledged in writing; that no part has been repaid, and that the sum of $1,000 with interest at 6% per annum from March 21, 1926, was due from the defendant, and that Dorothy O. Swallow died after the loan of said sum of money.

Defendant's sworn amended answer was filed September 24, 1928, alleging that plaintiff was not the qualified and designated executor of Dorothy O. Lark, deceased; that the defendant did not borrow the money as alleged in plaintiff's statement of claim; that she did not borrow any sum of money from the said Dorothy O. Lark, and that she is not indebted to Dorothy O. Lark or to the plaintiff herein as executor of the last will and testament of Dorothy O. Lark, deceased; and further, that the claim of the plaintiff is barred by

the statute of limitations, because said cause of action is not evidenced by a promise in writing.

The issues were joined on plaintiff's statement of claim, and the amended statement of defense, and the cause came on for trial.

No complaint is made to the pleadings by either party as to the form or substance thereof.

The facts as they appear from the evidence are that a series of seven letters were written by the defendant and her husband, Charles W. McKellar to Mrs. Lark. It is claimed the facts show that the defendant and her husband joined in asking Mrs. Lark for a loan of $1,000 to them, and that said loan was made in direct pursuance of said request. A check for $1,000, made payable to Charles W. McKellar, dated March 15, 1929, duly endorsed and deposited by him, and also a bank book of the Wilmette State Bank appear in evidence, from which it appears that the $1,000 so loaned was from the funds of Mrs. Lark, in an account held jointly by her and Mrs. Kate Hodgkins.

The defendant offered in evidence a letter bearing date January 29, 1928, written by the defendant, as was also a receipt written and signed by the husband of the defendant, together with certain other evidence by the defendant, to which objection was made on the ground that she was disqualified to testify. The letter dated January 29, 1928, written by the defendant to her mother, Harriet C. Lark, now deceased, is in part as follows:

> "Charlie said to ask you if you would loan him $1,000 or $1,500 at 6% to pay his taxes in Apr. He will give you his note and pay the interest promptly, and you can have it semi-annually if you prefer. That will ease his mind on that score, and we can let any further investments go until you return * * * Hattie."

Subsequently, Mrs. Lark directed that a Cashier's Check be drawn for $1,000 on the Wilmette State Bank, dated March 15, 1929, which was made payable to the order of Charles W. McKellar, the defendant's husband, and paid out of the joint account of Mrs. Lark and Mrs. Kate Hodgkins. This check was received in evidence, and also the pass book showing a savings account at the Wilmette State Bank of H. C. Lark.

the statute of limitations, because such action or inaction is not evidenced by a promise in writing.

The trial court sent judgment in plaintiff's statement of claim, and the remaining statement of defence, was the issue sent to the trial.

Co-guarantor is liable to the creditors by either paying in to the bank or indemnifying himself.

The trial in lady claims that the defendant had by that a letter of seven letters was written by the defendant and her husband, Charles . Lalonde to Mr. Lund. It is claimed the letter also that the defendant had the material liable to sending Mrs. Lund for a loan of $1,000 to them, the lady would loan the money in direct proportion of said payment. A check for $1,000, made payable to Charles G. Lalonde, came back to, Lund, duly endorsed and deposited to the, and also a book part of the letter is that loaned to Lalonde, from which it [illegible] the $1,000 he loaned was from the funds of Mr. Lund, he is account held jointly by her and her husband.

The defendant claimed to remember a letter coming from the lady, 1928, written by her husband, as was also a receipt written and signed by the husband of the defendant, together with cash in other evidence by the defendant. To which objection was made on the ground that the was inadmissible in evidence. The letter dated January 20, 1928, written by the defendant to her husband, Charles . Lund, was discovered, in its part of letters:

"Charlie said to ask you if you would lend him $1,000 or $1,500 as he may use the money in, he said, [illegible] you is quite sure you the interest promptly, and pay one half of the principal if you prefer. Look well into the matter and write, and we can let him have further instalments as would the [illegible]."

Subsequently, Mrs. Lund received from a [illegible] check for $1,000 on the Atlantic Trust Company, dated [illegible] 12,1928, which was made payable to the order of Charles . Lalonde, the defendant's husband, and said had of the joint account of Mr.Lund and Mr.Lalonde Mortgage. This check was endorsed in [illegible], and also the back bearing a notion stamped in the Atlantic Trust Co. of . . Lund.

The plaintiff seeks to have this court construe the other letters which passed between the parties to the effect that the defendant is likewise liable for this loan claimed to have been made by the now deceased Mrs. Lark, and points to several letters in the record. The defendant, however, has quoted the letters more fully, and the letter dated February 17, 1929, states:

> " * * * - all I have asked is a loan of $1,000 to help us out just this once. Its the first favor we have ever asked of you. Now Charlie is depending upon it and will pay you in addition to the 6% int. your 3% that you claim you can't afford to lose, and which only amts to 2 months to date in bank. So that is no excuse and Kate has nothing whatever to do with our business. Much love and in haste, Hattie."

The letter marked Exhibit 3, bears no date. In a part of this letter we find this language used by the defendant in writing to her mother:

> "Now I don't see what Kate has to be worked up about your savings as you state in your last letter. I am not, I hope it is safe while there, and as for loaning us $1,000 it could not be safer anywhere - and as I told you Charlie will pay you the extra 3% for the time it has been in the bank - so that you will not lose anything letting him have it, and 6% is all he charged you although you offered more and we won't keep you out of it long at that, we only need it now to help us out in a pinch."

Then follows a letter from Charles McKellar, the husband of the defendant in this case, bearing date March 4, 1929. From this letter it would seem that Mr. McKellar had loaned Mrs. Lark some money. In the letter this language is used:

> " * * * in the first place you led us to believe that you were going to pay off these loans, I did not ask you to, but wanted you to renew the note, and loan us $1,000 on our note and as long as you had the money to loan where could you get better security. Our property is perhaps worth ten times what yours is worth, and we did not ask for further security.
>
> We need the $1,000 to help us out on taxes. Let me know immediately if we can have it or not. Have your bank figure up the renewal note and send it to me at the same time, and I will then send you my note for the amount of your loan to me.
>
> Hattie joins me in sending love and best wishes,
> Lovingly, Charlie."

So, from the reading of the several letters which passed between the parties prior to the making of the loan it does seem as though this loan was made to the now deceased Charles McKellar.

The plaintiff seeks to have this court construe the above letters which passed between the parties to the orders that the defendant is liable for the loss claimed to have been made by the non delivery and, lastly, he points to several letters in the record. The defendant, however, has quoted the letters more fully, and the letter dated January 17, 1920, states:

> " " " - all I have asked is a loss of $1,000 to only on not just this once. In the first place we have ever taken at you. Our dealis is depending upon it and will ay you in addition to the $1 tax. Just to that you claim you don't agreed to take, and which only take 2 months to date in book. So that is as answer and you not really whatever to do all our business. Such love and in haste, Davis."

The letter marked Exhibit 5, bears no date. In a part of this letter of that this language used by the defendant in writing to her mother:

> "Now I don't see what kind has to be worried as about your evening as you write in your last letter. I am not, I have it is safe while there, and as for leaving up $1,000 it would not be safer anywhere - and as I tell you Davis will ay you the extra $% for the time it has been in the bank - so that you will not lose anything letting the bank it, and it is not to charge you although you offered some and as you't seen you not of it long it that, we only took it now to take us and in a place."

Then follows a letter from Davis dated January, the husband of the defendant in this case, bearing date March 4, 1920. Upon this letter it would seem that Mr. Gamblin had lumped the. Let some money. In the letter this language is used:

> " " " in the first place you led us to believe that you were going to try all these losses. I did not ask you to, but reminded you to work the mode, and loss of $1,000 we not only not a loss as you had for money to lose where could you get better security. Our property is worth more than three times your to work, and we did not ask for further security.
>
> We need the $1,000 to help us out on today. Let me know immediately if we can have it or not. State your best figure on the renewal note and send it to me at the same time, and I will then send you by note for the amount of your loss to me.
>
> Hoping you to be working long and been wishes,
>
> Sincerely, Davis."

So, from the reading of the several letters which passed between the parties prior to the making of the loss it does seem to though this loss was made in the law thereof Davis Gamblin.

The defendant's theory is that when Charles McKellar received the money he applied it on a debt owing by Mrs. Lark, and sent her a receipt for the money and called their accounts square. There is nothing in the record which would indicate that the defendant, Harriet W. McKellar, ever received this money, or ever received the benefit of it. The receipt signed by Mr. McKellar shortly after the money was loaned, bears date April 23, 1929, and is in these words:

> "Received of Mrs. H. C. Lark One thousand and no/100 Dollars in full of account to date on all loans and notes signed by her to me.
>
> Charles W. McKellar."

and on the back of this receipt appears the following:

> "Hang this on the dog's 'Xmas' tree - Mrs. H. C. Lark."

From the record as we have it before us in this case, we believe the court did not err in entering judgment for the defendant.

The defendant offers as a defense the Statute of Limitations and cites authorities in support thereof, but in view of our conclusions in this case we believe it is not necessary to discuss the point. However, we think we should consider the question of whether the trial court committed reversible error in permitting the defendant to testify as to the correct date of the first letter written by the defendant to her mother dated January 29, 1928. The defendant was called as a witness to testify as to the date on which the letter was written, and for that purpose only, and from her testimony it appears that this letter should have been dated in the year 1929, not in 1928, and she testified as to her reasons for fixing this time.

The plaintiff claims it was error to admit this evidence of the defendant over objection, on the ground that the witness was not competent because of interest as an heir of Mrs. Lark, deceased. The plaintiff is seeking to recover from the defendant $1,000 loaned to her by Mrs. Lark in her lifetime. Plaintiff points to Cahill's Ill. Rev. Stats. Ch. 51, Par. 2 of the Evidence Act, which provides:

The defendant's theory is that when Charles Kettler received the money he applied it on a debt owing by Mrs. Lark, and sent her a receipt for the money and called their accounts square. There is nothing in the record which would indicate that the defendant, Kettler & Kettler, ever received this money, or ever received the benefit of it. The receipt signed by Mr. Kettler shortly after the money was loaned, bears date April 24, 1909, and is in these words:

> "Received of Mrs. O. E. Lark the treasurer and notes\(?) bellate in full of accounts to date on all items and notes signed by her to us.
>
> Charles S. Kettler."

and on the back of this receipt appears the following:

> "Paying this on the day's interest - Mrs. H. E. Lark."

From the record as we have it before us in this case, we believe the court did not err in entering judgment for the defendant.

The defendant offers as a witness the Clerk of Statistics and other authorities in support thereof, but in view of our conclusion in this case we believe it is not necessary to discuss the point. However, we think we should consider the question of whether the trial court committed reversible error in permitting the defendant to testify as to the correct date of the first letter written by the defendant to her mother dated January 23, 1908. The defendant was called as a witness to testify as to the date on which the letter was written, and for that purpose only, and from her testimony it appears that this letter should have been dated in the year 1907, not in 1908, and she testified as to her reasons for fixing this time.

The plaintiff claims it was error to admit this evidence of the defendant over objection, on the ground that the witness was not competent because of interest as an heir of Mrs. Lark, deceased. The plaintiff is seeking to recover from the defendant $1,000 loaned to her by Mrs. Lark in her lifetime. Plaintiff relied to Section 1111, Stats. Ch. 51, 1908, as the evidence for which provides:

"No party to any civil action, suit or proceeding, or person directly interested in the event thereof, shall be allowed to testify therein of his own motion, or in his own behalf, by virtue of the foregoing section, when any adverse party sues or defends as the trustee or conservator of any idiot, habitual drunkard, lunatic or distracted person, or as the executor, administrator, heir, legatee or devisee of any deceased person, or as guardian or trustee of any such heir, legatee or devisee, unless when called as a witness by such adverse party so suing or defending, and also except in the following cases, namely: "(which are not material in this action).

However, cases of a like nature have been passed upon by our appellate courts and have some bearing upon the issue here. In the case of Farrand v. Yates, 249 Ill. App. 180, the court said:

"Appellees are defending as heirs of a deceased person, and, under section 2 of the Evidence Act, Cahill's St. ch. 51, Par. 2, complainant was not a competent witness generally, still a plaintiff or complainant, under such circumstances, may make an affidavit of the loss of the instrument, necessary to lay the foundation for secondary proof of its contents. Becker v. Guigg, 54 Ill. 390; Taylor v. McIrvin, 94 Ill. 488; Wade v. Wade, 12 Ill. 89; Palmer v. Logan, 4 Ill. (3 Scam.) 56; Dormedy v. State Bank of Illinois, 3 Ill. (2 Scam.) 236. The affidavit of complainant was competent only to show that the original instrument was lost, as a basis for secondary evidence of the contents thereof, but it was not proof of the contents of the instrument itself. Metcalf v. Metcalf, 219 Ill. App. 96."

Then again in the case of Miller & Graves v. Pratz, 179 Ill. App. 204, wherein Miller & Graves filed a claim against the Estate of John E. Pratz, deceased. The claim was based upon a book account and the books were kept by Graves, and he was permitted to make the supplementary oath authorizing the admission of the books in evidence. The court said:

"We sustain that ruling and hold it the natural conclusion to be drawn from the first three sections of the act in regard to Evidence. Section 1 provides that no person shall be disqualified as a witness in any civil suit, except as thereinafter stated, by reason of his interest in the event thereof. Section 2 provides that no party to a civil action shall be allowed to testify therein in his own behalf 'by virtue of the foregoing section' when the adverse party sues or defends as executor, etc. Section 3 provides that where in any civil action the claim or defense is founded on a book account, any party may give the testimony necessary to admit the books. The meaning of section 2 is that section 1 shall not authorize the party to testify in his own behalf against an executor. Section 3 we regard as an independent provision, having no reference to either sections 1 or 2. We are of opinion that it was meant thereby to provide that in all cases a party may testify as therein stated to the extent necessary to admit his books in evidence.

"No party to any civil action, suit or proceeding, or person directly interested in the event thereof, shall be allowed to testify concerning or his own behalf, or in his own behalf, by virtue of the foregoing section, when any adverse party who is living or is the survivor of any fact, material concerning, insane or incompetent person, or in the executor, administrator, heir, legatee or heirs of any deceased person, or in behalf or testify of any such fact, legatee or devisee, unless such witness is a witness by some adverse party to testify or testifying, and also except in the following cases, namely: (Section 1/2 not material in this action).

However, cases of a like nature have been passed upon by our appellate courts and have some bearing upon the issue here. In the case of Lemmon v. Lemmon, 108 Ill. App. 187, the court said:

"Assuming the doubtful as being of a dangerous nature, and, under section 2 of the Evidence Act, Chapter 51, Sec. 2, par. 2, competent as not a transfer without consideration, still a validity or consistent, under such circumstances, for the attitude of the law of the instrument, necessary to lay the foundation for secondary proof of its contents. Lemmon v. Lemmon, 84 Ill. 382; Durkee v. Spivey, 84 Ill. 486; Cook v. Cook, 13 Ill. App. 3; Palmer v. Lynch, 1 Ill. (1 Gilm.) 62; Johnson v. Ellis Stock of Lumber, 9 Ill. App. (8 Gilm.) 206. The difficulty of establishing the original instruments was lost, as a basis for secondary evidence of the contents thereof, but it was not proof of the contents of the instrument itself. Kimball v. Schoolcraft, 102 Ill. App. 66."

Then again in the case of Miller & Dunne v. Cook, 177 Ill. App. 304, wherein Miller & Dunne filed a claim against the estate of John L. Cook, deceased. The claim was based upon a book account and the books were kept by the wife, and he was permitted to make the supplementary oral testimony concerning the contents of the books in evidence.

The Court said:

"We assume that notice and hold it the subject provisions to be taken from the first three sections of the act in regard to evidence. Section 1 provides that no person shall be disqualified as a witness in any civil suit, because of interest or for the reason of his interest in the event thereof. Section 2 provides that no party to a civil action shall be allowed to testify therein in his own behalf by virtue of the foregoing section, when the adverse party sues or defends as executor, etc. Section 3 provides that where in any civil action the claim or defense is founded on a book account, any party may give the testimony necessary to state the book. The reading of section 3 in this section I shall not exclude the party to testify in his own behalf against an executor. Section 3 as regard to the interpretation, having no reference to either section 1 or 2. We are of opinion that it was meant thereby to provide that in all cases a party may testify as therein stated to the extent necessary to admit his books in evidence.

That statement of the court very well applies to the facts in this case regarding the date of the letter and the competency of the defendant to testify to the extent necessary to fix the proper date of this letter.

Counsel for the plaintiff criticizes the cases from which we have quoted, on the theory that they do not apply. We believe they do, not only for the reasons stated in the opinions, but also because of evidence offered of certain events to fix the proper date, which evidence we are of the opinion it was proper for the court to admit. The case was submitted to the court, and we have the right to assume in reaching this conclusion that the trial court considered only competent evidence.

For the reasons stated the judgment is affirmed.

JUDGMENT AFFIRMED.

DENIS E. SULLIVAN AND HALL, JJ. CONCUR.

That statement of the court may well apply to the facts in this case regarding the duty of the letter and the dependency of the defendant is doubtful in the extent necessary to fix the proper date of this letter.

Counsel for the plaintiff criticized the cases from which we have quoted, on the theory that they do not apply. We believe they do, not only for the reasons stated in the opinions, but also because of evidence offered of certain events to fix the proper date, which evidence at the time of the opinion it was proper for the court to admit. The case was submitted to the court, and we have the right to assume in reaching this conclusion that the trial court considered only competent evidence.

For the reasons stated the judgment is affirmed.

DONOVAN, J.

WALTER C. WALLACE and DAL, JJ. CONCUR.

39369

MARIE PIETRAS,

(Plaintiff) Appellee,

v.

JOZEF MOSKAL, et al.,

On Appeal of JOZEF MOSKAL,

(Defendant) Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

296 I.A. 640[3]

MR. PRESIDING JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant Jozef Moskal from a decree of foreclosure entered on January 8, 1936.

It appears from the facts that the defendant and his wife were liable on a $20,000 mortgage, which was in default, and the plaintiff, in November, 1935, filed her bill to foreclose. Personal service of summons was had, and on December 21, 1935, defendant was adjudged in default for want of appearance. Subsequently, on January 8, 1936, a decree of foreclosure, pro confesso, was entered. On February 5, 1936, within 30 days, motion was made by the plaintiff to vacate the decree, and this motion was continued to February 10, 1936.

It further appears from the facts that on the last date an order was entered, " * * *that the motion of plaintiff to vacate the decree * * * is hereby entered and continued * * * to February 28, 1936," and on the latter date an order was entered by the court vacating the foreclosure decree followed by an amendment of the complaint, making "Unknown Owners" additional parties defendant. The defendants were ruled to answer the amended complaint, and failing to answer they were again defaulted by an order entered on April 9, 1936. Thereafter the decree of foreclosure was again entered pro confesso on April 9, 1936, against all of the defendants. Sale was had pursuant to said decree, at which the plaintiff was the purchaser, and on May 8, 1936, this sale was confirmed. The sale resulted in a deficiency

[illegible]

MARIE VICTORS,

(Plaintiff) Appellant,

v.

JOHN SCHOCK, et al.,

on appeal of Jimmie Johnson,

(Defendant) Appellee.

Mr. Justice Jerome, delivered the opinion of the court.

This is an appeal by the defendant Jerry Johnson from a decree of foreclosure entered on January 8, 1936.

It appears from the bills that the defendant and his wife were liable on a $10,000 mortgage, which was in default, and the plaintiff, in December, 1934, filed her bill to foreclose. Personal service of summons was had, and on December 21, 1934, defendant was adjudged in default for want of appearance. Subsequently, on January 8, 1935, a decree of foreclosure was entered. On January 6, 1936, within 30 days, motion was made by the plaintiff to vacate the decree, and this motion was sustained on February 13, 1936.

It further appears from the record that on the last date an order was entered, " " " that the motion of plaintiff to vacate the decree " " " is hereby entered and sustained " " " to February 24, 1936," and on the latter date an order was entered by the court vacating the foreclosure decree followed in an summary of the complaint, making "Jimmie Johnson" additional matter introduced. The defendants were called to answer the amended complaint, and failing to answer they were again defaulted by an order entered on April 6, 1936. Thereafter the decree of foreclosure was again entered on April 6, 1936, against all of the defendants. This was the decree to sell decree, at which the plaintiff was the purchaser, and on May 8, 1936, this sale was confirmed. The sale resulted in a deficiency

of more than $4,000. A receiver was appointed by the court on June 30, 1936, and on January 12, 1937, the court approved a lease by the receiver to said Jozef Moskal for one year from January 1, 1937, subject, however, to the further order of the court.

Upon the expiration of the period of redemption, a master's deed was issued to the plaintiff on August 5, 1937. The receiver's final report, including a prayer that possession of the premises be turned over to the plaintiff, was filed on August 19, 1937, to which report the defendant Jozef Moskal filed objections, upon the ground that the master's deed and sale upon which it is based and the decree under which such sale was had are null and void and without force and effect, and that the court had no jurisdiction to enter the decree of April 9, 1936, for the reason that said cause had been finally disposed of by a decree entered on January 8, 1936, and that the court was without jurisdiction to vacate and set aside the decree of January 8, 1936, for the reason that it had been vacated by order of February 28, 1936, which was more than 30 days after January 8, 1936, and that no written motion had been made at the time for the vacation of the order, and the same grounds are now urged upon appeal, and the defendant prays that possession of the property be turned over to him and his wife as the owners of the equity of redemption.

A hearing was had on the receiver's petition and objections of the defendant thereto, on September 9, 1937, and the court approved the master's report, discharged the receiver and directed "that possession of the premises be surrendered to the plaintiff herein", the purchaser at the sale.

Subsequently, on September 21, 1937, the plaintiff exhibited to the defendant Jozef Moskal her master's deed and served a demand for possession. This was done according to the provisions of the foreclosure decree, which ordered that possession be surrendered to

of more than $4,000. A receiver was appointed by the court on June 30, 1926, and on January 1, 1927, the court discharged a lease by the receiver to will Jones dated for one year from January 1, 1927, subject, however, to the further order of the court.

Upon the expiration of the period of redemption, a master's deed was issued to the plaintiff on August 2, 1927. The receiver's final report, including a proper and reasonable of the premises be turned over to the plaintiff, was filed on August 12, 1927. In which report the defendant Jones filed objections, upon the ground that the master's deed and sale upon which it is based are void because under which such sale was had was not legal and without jurisdiction and effect, and that the court had no jurisdiction to enter the decree of April 2, 1926, for the reason that said owner had been finally discharged of by a decree entered on January 2, 1926, and that the court was without jurisdiction to vacate and set aside the decree of January 2, 1926, for the reason that it had been vacated by order of February 26, 1926, which was more than 21 days after January 2, 1926, and that no written motion had been made at the time for vacation of the order, and the same grounds are now urged upon appeal, and the defendant prays that possession of the property be turned over to him and his wife as the owners of the equity of redemption.

A hearing was had on the receiver's motion and objections of the defendant thereto, on November 2, 1927, and the court approved the master's report, discharged the receiver and directed "that possession of the premises be surrendered to the plaintiff herein", the mortgagee at the sale.

Subsequently, on December 12, 1927, the plaintiff executed to the defendant Jones and wife her master's deed and gave a tenant for possession. This was done according to the provisions of the foreclosure decree, which directed that possession be surrendered to

the grantee named in the master's deed, and in case of default thereof, that a writ of assistance issue. On September 21, 1937, the defendant Jozef Moskal moved for leave to file his petition to vacate the decree of foreclosure, based in substance upon the same grounds set up as objections to the receiver's final report and overruled on September 9, 1937. At this hearing on September 21, 1937, on petition of the plaintiff, the court ordered that a writ of assistance issue to dispossess the defendant.

We quite agree with the defendant that the question of jurisdiction may be raised at any time, and the court has the power to vacate a judgment where at the time such judgment was entered the court was without jurisdiction. The question before this court is whether the court had jurisdiction at the time the decree of January 8, 1936, was entered, and the decree of pro confesso on April 9, 1936.

The point stressed by the defendant is that after a default foreclosure decree was entered on January 8, 1936, and vacated later, on February 28, 1936, upon a motion entered on February 10, 1936, the court was without jurisdiction, and that when a motion was made by the plaintiff on February 5, 1936, which was within 30 days after the decree was entered by the court, this motion was continued to February 10, 1936, and on that date an order was entered, " * * * that the motion of plaintiff to vacate the decree * * * is hereby entered and continued * * * to February 28, 1936," when an order was entered vacating the foreclosure decree as set forth in detail in our opinion.

There was a motion pending at the time this last order was entered, and as far as appears from the record there was no disposition made of the motion entered by the plaintiff on February 5, 1936, to vacate the decree, except, as herein indicated, it was continued until February 10, 1936, when on that date the court ordered that the motion of plaintiff to vacate the decree "is hereby entered and

the grounds stated in the master's order, and in case of certain
thereof, that a writ of restitution issue. On September 21, 1927,
the defendant moved against such order to file his petition to
vacate the decree of foreclosure, stated in substance upon the ground
grounds set up in objections to the receiver's final report and over-
ruled on September 6, 1927. In this motion on September 21, 1927,
on petition of the plaintiff, the court ordered that a writ of
restitution issue to dispossess the defendant.

On motion after the terminated term the question of
jurisdiction may be raised at any time, and the court has the power
to vacate a judgment made at the time such judgment was obtained
the court was without jurisdiction. The question before this court
is whether the court had jurisdiction at the time the decree of
January 8, 1926, was entered, and the decree of sale confirmed on
April 5, 1926.

The point relied on by the defendant is that after a default
foreclosure decree was entered on January 8, 1926, and vacated later,
on February 16, 1926, upon a motion entered on February 15, 1926,
the court was without jurisdiction, and that since a motion was made
by the plaintiff on February 5, 1926, which was within 30 days after
the decree was signed by the court, this motion was sustained in
February 15, 1926, and no such date as the order was entered, ' " " that
the motion of plaintiff to vacate the decree " " is before entered
and continued " " to February 16, 1926,' then as order was entered
vacating the foreclosure decree as set forth in detail in the opinion.

There was a motion pending at the time this later was
entered, and in fact as appears from the record there was no disposition
made of the motion entered by the plaintiff on February 5, 1926, to
vacate the decree, hence, as herein indicated, it was continued
until February 16, 1926, when on that date the court ordered that the
motion of plaintiff to vacate the decree " is hereby entered and

continued * * * to February 28, 1936". There is nothing in the order continuing the previous order entered on February 10, 1936. If no disposition were made of this motion, it continued on notwithstanding the order entered on the same day, which indicates that on motion of the plaintiff the motion to vacate the decree was continued.

The defendant urges and stresses stremuously that the last motion entered by the court on February 10, 1936, and allowed on February 28, 1936, being more than 30 days after the entry of the decree on January 8, 1936, the court was without jurisdiction when an order was entered subsequently vacating the foreclosure decree. As stated before there was a pending motion of February 10, 1936, which the court continued by a subsequent order. Of course the court still had jurisdiction of the proceeding in the sense that the cause, as provided for by statute, continued until final disposition of the litigation.

It is also called to the attention of this court that the attempt of the plaintiff to vacate the decree on February 28, 1936, was improper because she did not comply with the provisions of Para. 7, Sec. 50 of the Civil Practice Act, which reads:

> "The court may in its discretion before final judgment, set aside any default, and may within thirty days after entry thereof, set aside any judgment or decree upon good cause shown by affidavit, upon such terms and conditions as shall be reasonable."

The answer of the plaintiff to this contention is that the record filed by the defendant is not sufficient to show that the plaintiff did not present to the court an affidavit in conformity with Section 50, Para. 7 of the Civil Practice Act, because no certificate of proceedings upon the hearing of the motion to vacate has been preserved by the defendant, and in the absence of a showing to the contrary, it is presumed the court acted upon evidence justifying the order entered.

continued * * * 19 February 19, 1958". There is nothing in the order sanctioning the previous order ordered on February 19, 1958. If so disposition was made of this motion, it continued in substantially the order entered on the same day, which indicates that on motion of the plaintiff the motion to vacate was denied and continued.

The defendant argue and strenuously that the last motion entered by the court on February 19, 1958, and filedon February 20, 1958, being more than 30 days after the entry of the decree on January 8, 1958, the court was without jurisdiction when on order was entered unnecessarily vacating the foreclosure decree. In stated before there was a pending motion of February 19, 1958, which the court continued by a subsequent order. If before the court still had jurisdiction of the proceeding in the sense that the court, as evidenced by statute, continued until final disposition of the litigation.

It is also pertinent to the attention of this court that the attempt of the plaintiff to vacate the decree on February 19, 1958, was improper because she did not comply with the requirements of Tex. T. Ann. 39 of the Civil Procedure Act, which reads:

"The court may in its discretion before final judgment, set aside any default, and any default thirty days after entry thereof, set aside any judgment or decree upon good cause shown by affidavit, upon such terms and conditions as shall be reasonable."

The answer of the plaintiff to this contention is that the record filed by the defendant is not sufficient to show that the plaintiff did not present to the court an affidavit in compliance with Section 39, Tex. T. of the Civil Procedure Act, because no affidavit of proceedings upon the hearing of the motion to vacate was ever preserved by the defendant, and in the absence of a showing to the contrary, it is presumed the court acted upon evidence justifying the order entered.

The case of Lange v. Meyer, 195 Ill. 420, supports the theory of the plaintiff, and we shall follow what we believe to be the rule as contended for by her. When the amendment was filed by the plaintiff, the defendant was required to answer the complaint as amended within 3 days, and not having answered within the time fixed, a default of the defendant was entered on April 9, 1936, and a decree entered on that date.

It is apparent that the defendants were personally served with summons and were in default, and it is not necessary, nor is it required by the rules laid down by courts of last resort, after default has been taken, that summons issue after amendment of the bill and service is renewed. If that were so, litigation would be interminable, and it would be rather embarrassing to amend a bill of complaint after service of summons was had and default of the defendant entered.

We believe the court was fully justified in entering the decree, and it necessarily follows that the writ of assistance entered against the defendant was justified by the decree after the expiration of the equity of redemption.

For the reasons stated the court did not err in entering the order that a writ of assistance issue against this defendant to deliver possession of the premises he now occupies.

ORDER AFFIRMED.

DENIS E. SULLIVAN AND HALL, JJ. CONCUR.

The case of Jones v. Bryan, 140 Ill. 476, supports the theory of the plaintiff, and we still believe that we believe to be the rule as enunciated for by us. Upon the demurrer now filed by the plaintiff, the defendant all required to answer the complaint as amended within 7 days, and not either answered within the time fixed, a default of the defendant was entered on April 9, 1908, and a decree entered on that date.

It is alleged that the defendants were personally served with summons but after it default, but it is not necessary, nor is it required by the rules laid down or another of last resort, after default has been taken, that summons issue after amendment of the bill and service is required. If this were so, litigation would be interminable, and it would be within contemplating to admit a bill of complaint after institution of suits and not without of the defendant entered.

We believe the merit the Bill justified in entering the decree, and it accordingly follows that the bill is sustained against the defendant was justified by the reason after the amendment of the supply of remedies.

For the reasons stated the court did not err in sustaining the order bill; a rule of jurisdiction have entered this decree as deliver possession of the premises on the complaint.

Judge affirmed.

Chas. E. Hollis for Def., Jr. Judge.

39993

THE NATIONAL CASH REGISTER COMPANY, a corporation,

(Plaintiff) Appellee,

v.

ARTHUR H. FOERSTER,

(Defendant) Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

296 I.A. 640[4]

MR. PRESIDING JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

Suit was instituted by the plaintiff to recover the sum of $425.00, due upon a contract for the purchase of a cash register to be manufactured by the National Cash Register Company, a corporation, and shipped to the defendant at his place of business in Maywood, Cook County, Illinois. The case was tried before the court and a jury, and at the close of all the evidence, the trial court, on motion of the plaintiff, instructed the jury to return a verdict for the plaintiff against the defendant for $425. Judgment was entered on the verdict, from which the defendant appeals to this court.

The contract upon which the suit is based is as follows:

"City of Chicago, County of Cook, State Ill.
The National Cash Register Company, Dayton, Ohio:
Date Mar. 30, 1938.

Please manufacture and ship freight prepaid to 1312 St. Charles Road, Maywood, City, Cook County, Ill. State, or to the nearest railroad station

(Residence Address . . . . . .)

One of your No. 2852 registers, Blk & Chrome Trim Finish, denomination of Keys . . . . . for use in Feed & Grain business, for which undersigned agrees to pay you Four Hundred Seventy-five Dollars ($475.00) as follows:

$25.00 cash;

$25.00 cash on arrival of register, and the following amount to be evidenced by note: * **"

The defendant filed an answer and counterclaim, admitting the execution of the contract, but denying that he defaulted under the terms of the contract. He further alleged in his answer that previous to the purchase of the cash register, it was represented to him the cash register would perform certain operations and that it

contained a certain number of columns; that the defendant, relying upon the representations, executed said contract and paid $50.00 as part of the purchase price; that subsequently, a cash register was delivered, which did not contain the number of columns, nor did it perform the functions as represented.

It appears from the evidence that on March 30, 1936, the defendant was in the grain and feed business, in Maywood, Cook County, Illinois, and on that day the defendant, in the company of his son, who on the day of the trial was a student at the University of Illinois, went to plaintiff's place of business, after hours, in the City of Chicago, where he met plaintiff's salesman, Raymond B. Berry, for the purpose of purchasing a cash register for his feed and grain business; that after looking at various cash registers he signed the contract set forth in the complaint and paid a deposit; that a week or ten days after he signed the order, he learned that model 2852, described in the contract, would not keep the departments of his business separate and would not give him separate totals; that plaintiff admitted that model 2852, mentioned in the contract, would not give the separate totals of the various departments; that they had cash registers which would give separate totals and that the external appearances of the machines were the same as 2852.

It also appears from the evidence that the plaintiff's salesman, Mr. Berry, admitted that Mr. Foerster told him what he wanted in his business and that he discussed it with him.

There is a dispute in the evidence as to what was said on the various occasions, but the question before us is as to the admissibility of the evidence of the defendant when he testified that before signing the contract he told the salesman Mr. Berry he wanted a cash register which would keep his departments separate and would total up each department at the end of the day; that he knew nothing

maintained a certain number of students; it is the defendant, relying upon the representations, therefore, with monitors and with 100.00 as part of the previous price; but nevertheless, a cash regulator was delivered, which did not contain the number of students, nor did it perform the functions as represented.

It appears from the evidence that on March 30, 1906, the defendant was in the trade and good business, in Aurora, Kane County, Illinois. Action that day the defendant, in the vicinity of his store, also on the top of the hill was a student in the University of Illinois, near to plaintiff's place of business, after hours, in the city of Chicago, where he met plaintiff's witness, Thomas E. Perry, for the purpose of persuading a cash regulator for his feed and grain business; that after leaving it without such regulators in stock the witnesses are prepared in the complaint and said a thousand; that a week or two days after he signed the order, he learned that model 2000, mentioned in the contract, would not be sufficient for his business; that if the defendant had shown the machine and would not give his representations; that plaintiff admitted that model 2000, mentioned in the contract, would not give the separate totals of the various departments; that they had cash registers which would give separate totals and that the personal appearance of the machines with the model of 2000.

It also appears from the evidence that the plaintiff's salesman, Mr. Perry, testified that Mr. Fairchild told his wife he wanted in his business and that he discussed it with him.

There is a dispute in the evidence as to what was said on the various occasions, but the question before us is as to the admissibility of the evidence of the defendant when he testified that before signing the contract he told the salesman Mr. Perry he wanted a cash register which would show the different departments and would total up each department at the end of the day; that he knew nothing

about cash registers and relied upon the plaintiff to manufacture a cash register to suit his needs; that he had a cash register which would not keep the separate totals; that he wanted one that would save him the necessity of taking all of the figures off the tape at the end of the day and then enter them into the various accounts; that he was told by the salesman the machine he was purchasing would give him the separate totals of each department at the end of the day; that he knew nothing about the different cash registers and he thought he was getting a cash register which would keep separate totals for each department.

This evidence was excluded from the jury, and it was at the close of all the evidence that judgment, on motion of the plaintiff, was entered by the trial court's instructing the jury to return a verdict for the plaintiff - as we have indicated.

The plaintiff contends that the defendant having signed a written contract calling for the manufacture and delivery of a cash register described as No. 2852, all agreements and representations were merged in the written contract; that the plaintiff having delivered the machine known as 2852,which the defendant refused, the defendant could not introduce any evidence to show what representations were made to him prior to the execution of the contract, the purpose for which the defendant wanted the cash register, or evidence that the cash register did not perform the functions required of it by the defendant.

The defendant's answer to this contention is that the evidence offered by him was competent not for the purpose of attempting to vary the terms of the written contract, but for the purpose of showing that the portion of the contract reading, 'One of your No. 2852 registers, denomination of keys . . . . . for use

in Feed & Grain business", was not sufficiently definite to preclude the defendant from showing the kind of cash register he required and had ordered for use in his grain and feed business, when he executed the contract, and defendant further contends that a space is provided in the contract to describe the denomination of the keys, and a glance at the contract shows the space for that purpose is blank.

It is clear from an examination of the contract in question that it does not appear what operations or what kind of cash register the defendant was to receive, except that it was to be used in his grain and feed business, which would indicate it was the intention of the parties at the time the contract was executed that the cash register was to fit some particular use.

Mr. Berry, the salesman who testified for the plaintiff, in relating what happened at the meeting with the defendant when the cash register was purchased, said that he was familiar with the mechanism of cash registers, and that Mr. Foerster, the defendant, and his son came to his office after business hours and he showed them various machines; that the defendant said he would like an adding machine as part of the cash register so as to add all the items of all the customers who came into his place of business, and that he had the defendant sign the contract for a No. 2852; that this machine is of special style and character.

It appears from the testimony of this witness that he interested the defendant in what he called an "itemizer" and the defendant said he would like a machine that would itemize; that the witness demonstrated this kind of machine, and the conference lasted an hour and a half. In his testimony he does say that the defendant said that he would like an itemizer. Just what an itemizer is we are not prepared to say from the record, but the evident fact is that the contract upon which the plaintiff relies is not complete in its

in feed & grain business", was not sufficiently material to preclude the defendant from showing the nature of such implying in invoices and had referred for use in his grain and feed business, which he conducted the contract, and defendant further contends that a grant is required in the contract to describe the denominations of the corp, and a clause in the contract where the grain for that purpose is clear.

It is clear from an examination of the contract in question that it does not appear that specifications of that kind of grain register the defendant was to receive, except that it was to be used in his grain and feed business, which would indicate it was the intention of the parties at the time the contract was executed that the grain register was to fit some particular use.

Mr. Perry, the salesman who testified for the plaintiff, in relating what happened at the meeting with the defendant when the grain register was introduced, said that he was familiar with the mechanism of grain registers, and that he, therefore, the defendant, and his son came to the office after business hours and he showed them various machines; that the defendant said he would like to getting machine as part of the grain registers so as to get all the items of all the customers who came into his place of business, and that he had the defendant sign the contract for a \$6. 00\$; that this machine is of special style and character.

It appears from the testimony of this witness that he interpreted the defendant in that to mean "ledger" and the defendant said he would like a machine that would iterize; that the witness demonstrated this kind of machine, and the conference lasted an hour and a half. In his testimony he does say that the defendant said that he would like an iterizer. Just what an iterizer is we are not informed by any from the record, but the evidence does be that the contract upon which the plaintiff seeks it not complete in the

terms, and in order to furnish the missing link the plaintiff put Mr. Berry on the stand to establish the kind of machine called for by the contract. In other words, the contract sued upon is not complete in its terms, in that it refers to the denomination of keys followed by a blank space after which appear the words, "for use in Feed and Grain business" of the defendant. The denomination of the keys no doubt would supply what both sides contend the defendant wanted. The plaintiff contends the defendant purchased an itemizer, whereas the defendant contends he purchased the machine which would give the total of the items in the different departments at the end of the day, and that was the kind of machine he wanted. If it were admissible for the plaintiff to establish by evidence this missing link of what was in the minds of the parties at the time the contract was executed, it would have been but simple justice to permit the defendant to tell what took place at this meeting which lasted an hour and a half.

The witness George Miller, who was called to the witness-stand by the plaintiff, is the creditor manager for the National Cash Register Company, and he stated in the course of his testimony that the Company manufactures a cash register that totals at the end of the day every item in separate departments that would make separate totals of the sales, cash received and money paid out, and at the end of the day all that would have to be done would be to take off the totals from the different departments.

It also appears from the evidence in this case that the plaintiff builds 1500 different kinds and types of registers, so it was evidently in the mind of the defendant to purchase a machine the style of which he claims he advised Mr. Berry, the salesman for the plaintiff company, he wished to purchase, and he should have been

terms, and is prior to furnish the details like the plaintiff has at. Berry on the ground in refusing the plat of machine making for by the contract. In other words, the contract work upon is not complete in its terms, in that it refers to the description of maps followed by a blank space after which follows the words, "for use in feed and grain machinery" of the defendant. The inconsistency of the maps no doubt would amply what both sides mentioned the contract wanted. The plaintiff measures the statement mentioned in issue, whereas the defendant contends he performed the machine which would give the total of the issue in the different departments of the use of the day, and that was the kind of machine he wanted. If it were established for the plaintiff to establish by evidence this missing link of work was in the minds of the parties at the time the contract was executed, it would have been but simple justice to permit the defendant to tell what took place at this meeting which lasted an hour and a half.

The witness Harry Miller, who was called to the witness-stand by the plaintiff, is the manager manager for the National Cash Register Company, and he stated in the course of his testimony that the Dayton manufacturers cash register that totals at the end of the day every time in separate departments that would make expense totals of the sales, cash received and money paid out, and at the end of the day all that would have to be done would be to take off the totals from the different departments.

It also appears from the evidence in this case that the plaintiff built 1000 different kinds and types of machines, as it was evidently in the mind of the defendant to purchase a machine the style of which he claims he ordered Mr. Berry, the witness for the plaintiff company, he stated to purchase, and he should have been

permitted to give his version of what took place at the meeting between the individuals when this alleged purchase was made.

This court is familiar with the rule that a contract complete in its terms and executed by the parties, cannot be varied or changed by offering evidence of what was said at the time or prior to the execution of the contract, but that rule does not apply in this case. The contract is not complete in its terms and this is made manifest by the testimony offered by the plaintiff, and upon objection by the plaintiff, the court sustained the objection to the offer of the defendant on the ground that all the terms had been merged in a written contract. This, we believe, under the circumstances, was error.

For the reasons stated the judgment is reversed and the cause remanded for another trial.

REVERSED AND REMANDED.

DENIS E. SULLIVAN, AND HALL, JJ. CONCUR.

permitted to give his version of what took place at the meeting between the individuals when this alleged verbiage was made.

This model is familiar with the rule that a contract modifies in its terms not changed by the parties, cannot be varied or changed by offering evidence of what was said at the time or prior to the execution of the contract, but such rule does not apply in this case. The contract in suit consists in its terms and this is much obscured by the exclusory affidavit of the plaintiff, and upon objection by the defendant, the court sustained the objection to the offer of the defendant to the ground that all the terms had been merged in a written contract. This, we believe, under the circumstances, was error.

For the reasons stated the judgment is reversed and the cause remanded for further trial.

ARTHUR W. DILLARD.

MELVIN E. WALTHALL, ALL MAN, JJ. CONCUR.

39084

FRED KOTEK,

Appellee,

v.

CHARLES KOTEK and JOSEPHINE KOTEK,

Appellants.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

25A

296 I.A. 641

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a decree of the Superior Court of Cook County entered in a suit brought by plaintiff, Frank Kotek, against Charles Kotek and Josephine Kotek, for a partnership accounting. The decree finds that defendants are indebted to plaintiff in the sum of $3,238.01.

Fred

The bill was filed on May 24, 1932, and alleges that in the year 1912, the plaintiff and his brother Frank Kotek, entered into an oral partnership agreement for the carrying on of a moving and cartage business in and about Chicago, and that the partnership continued until the year 1916, when the defendant, Charles Kotek, became a partner; that in the year 1919 the partnership purchased a certain described lot with a building thereon, located at 3911 West 26th Street, in the city of Chicago; that because Charles Kotek was in financial difficulties, his interest in this real estate was conveyed to Charles's wife, Josephine Kotek; that certain loans made by the partnership, which a mortgage on the real estate was given to secure, had been paid off, and the mortgages released; that in 1924 Frank Kotek withdrew from the partnership, and that thereafter it continued between the plaintiff and Charles Kotek under an oral agreement between them, each having an equal interest therein; that upon the withdrawal of Frank Kotek, he, Frank Kotek, was paid $8,000.00 by Charles Kotek, and that thereafter Frank Kotek was paid the sum of $13,000.00 from the partnership fund in full for his interest in the partnership; that Frank Kotek and his wife, by quit-claim deed, conveyed their interest in the partnership property

to Charles Kotek and Josephine Kotek, and that thereby the title to the premises became invested with an undivided one third interest in Fred Kotek, an undivided one third interest in Josephine Kotek and an undivided one third interest in Charles Kotek and Josephine Kotek in joint tenancy, and that such premises constituted an asset of the partnership, subject to the payment to Charles Kotek of $8,000.00 paid by him to Frank Kotek; that for several years prior to the filing of the petition, the partnership had conducted a branch office of their business in plaintiff's residence in Cicero, Illinois, and that Charles Kotek managed the portion of the business of the firm carried on at 3911 West 26th Street, in Chicago. It is further charged that Charles Kotek has from time to time, since the year 1924, applied to his own use from the receipts and profits of the business, large sums of money greatly in excess of his share, and has not accounted for the same to the plaintiff; that during said time, Charles Kotek was in control of the partnership books, records and accounts at the Chicago office, and had made numerous expenditures of partnership funds which are not shown on the partnership books, and for which he failed to account; that he has rented out space in the partnership property and has not accounted for the proceeds thereof; that the books and records of the transactions referred to for the years 1931 and 1932 and other years are in possession of Charles Kotek, and by him withheld from plaintiff's inspection; that Charles Kotek is indebted in various amounts to the partnership, and has not afforded the plaintiff the means of ascertaining the true state of his accounts, although often requested so to do; that if Charles Kotek would render an account to the firm of his receipts and payments on account of partnership matters, and of the gains and profits which have been made since the year 1924, it would appear that he has received upwards of $15,000.00 beyond his proportion of the partnership profits. Plaintiff further states that he has been, and is at

by Charles Yerkes and Charlotte Yerkes, and this Company has title to the premises herein described with an undivided one third interest in fee later, an undivided one third interest in Jacqueline Yerkes and an undivided one third interest in Charles Yerkes and Jacqueline Yerkes in joint tenancy, and that such premises constituted an asset of the partnership, subject to the purpose to Charles Yerkes of $8,000.00 paid by him to Yerkes Corp; that for several years prior to the filing of the petition, the partnership had maintained a branch office of their business in Louisville's residence in Green, Illinois, and that Charles Yerkes managed the operation of the business at that office and in fact was the manager of the business at the time carried on at 1111 West 38th Street, in Chicago. It is further charged that Charles Yerkes had from time to time, since the year 1924, applied to his own use from the receipts and profits of the business, large sums of money rightly in excess of his share, and has not accounted for the same to the Bankrupt; that during said time, Charles Yerkes was in control of the partnership books, records and accounts at the Chicago office, and had made numerous misrepresentations of partnership funds which are not shown on the partnership books, and for which he failed to account; that he has received and spent in the partnership property and has not accounted for the expenses thereof; that the books and records of the partnership received in for the years 1921 and 1922 and other years are in possession of Charles Yerkes, and by his withholding from Bankrupt's jurisdiction; that Charles Yerkes is indebted in a sum unknown to the partnership, and has not affected the liability the source of withholding the time since of his insolvent, although often requested so to do; that if Charles Yerkes would render an account of the fund of his business and partnership an amount of partnership property, and of the gains and profits which have been made since the year 1921, it would appear that he has received property of $[illegible] beyond his contributions of the partnership profits. Bankrupt further alleges that he has been, and is in

all times ready to account for his part of the business, prays for an accounting for a partition of the premises so alleged to be held as partnership property, and that the interest of Josephine Kotek in the property be decreed to be held in her trust for the partnership. Answers were filed by defendant and the cause was referred to a Master, who, after hearing a large amount of evidence, submitted the following report to the court, in which he finds that in 1916 Fred Kotek, Frank Kotek and Charles Kotek entered into a partnership for the purpose of carrying on a moving and cartage business in Chicago and adjoining territory under the name of Kotek Brothers, no written agreement having been executed; that in 1924 Frank Kotek withdrew from the partnership and thereafter the partnership was continued by Fred Kotek and Charles Kotek, the main office being at 3911 West 26th Street, Chicago; that complainant transacted part of the business at his home, 5643 West 22nd Street, Cicero, Illinois, which consisted of taking orders for hauling; the orders were telephoned to the main office and handled by the partnership; that in 1930 and 1931 controversies between Frank and Charles Kotek arose and the termination of the partnership was discussed; that in 1932 a dispute arose over firm trucks, complainant claiming that his brother Charles prevented him from taking out the trucks by removing carburetor top, saying that the trucks belonged to him; Charles Kotek testified that he stopped his brother Fred from taking out the truck and that he, Fred, removed the carburetor top and took it away. Both agreed that they then stopped doing business as a partnership, Charles remaining in control of the business at the firm office and Fred took no further part in the partnership business but operated a moving and cartage business from his own home; several attempts to adjust their differences were made but were unsuccessful; that the premises at 3911 West 26th Street consist of a lot and building used by the

all items ready to remove for his part of the business, urge for an accounting for a portion of the profits so alleged to be held as partnership property, and that the interest of Dorothine Lotet in the property is desired to be held in her trust for the partnership. Abreys were filed by defendant and the cause was referred to a Master, who, after hearing a large amount of evidence, submitted the following report to the court, in which he finds that in 1928 Fred Lotet, Frank Bonk and Dorothy Lotet entered into a partnership for the purpose of carrying on a saving and storage business in Chicago and adjoining territory under the name of Cook Brothers, no written agreement having been executed; that in 1929 Frank Bonk withdrew from the partnership and thereafter the partnership was continued by Fred Lotet and Dorothy Lotet, the main office being at 5921 West 26th street, Chicago; that nonpartnerships transported most of the business at his home, 5420 West 22nd Street, Cicero, Illinois, which consisted of taking orders for selling the orders and equipment to the main office and handled by the partnership; that in 1930 was just commencing between Fred and Dorothy Lotet upon the operation of the partnership, was discovered; that in 1929 a storage house was fire stroke, complainant claiming that his brother Dorothy prevented him from taking out the trucks by removing carburetor key, saying that the trucks belonged to him; Dorothy Lotet testified that he stopped his brother Fred from taking out the trucks and took the, Fred, removed the carburetor key and hid it away. Both agreed that they then stopped doing business as a partnership, Dorothy remaining in control of the business at the 26th office and Fred took no further part in the partnership business but operated a moving and storage business from his own home; several witnesses to refute their differences were made but were unsuccessful; that the property at 5921 West 26th Street consist of a lot and building used by the

partnership; that the title was conveyed to Frank Kotek, Fred Kotek and Josephine Kotek, wife of Charles Kotek; that Charles Kotek being at that time indebted on a certain judgment, and at his request his wife Josephine was made one of the grantees in the deed; that the building now on said lot was erected by the partnership in 1919 and 1920 at a cost of $18,000, of which $12,000 was procured by a loan and afterwards repaid out of partnership funds; that Frank Kotek withdrew from the partnership in 1924 and quitclaimed his interest in the partnership property to Charles and Josephine Kotek; that in payment of his interest in the partnership he retained partnership money which he had collected and in addition the surviving partners paid him $15,000, of which sum $8,000 was raised by Charles Kotek; that in January, 1932, when Kotek Brothers ceased doing business, the partnership owned the property at 3911 West 26th Street, four trucks which were later levied on against the partnership in favor of the Adams State Bank; that the indebtedness of the partnership at its dissolution amounted to $1,912.25; complainant filed a partnership account to which defendants filed objections; in said account Charles Kotek is charged with collections aggregating $6,045.50 during the years 1925, 1926 and 1931; defendants object to said charges; defendants also object to the item in said account showing collections by Charles Kotek of rentals of the store aggregating $4,800 for the term from September 1, 1926 to December 31, 1931; defendants also object to the account showing collections for store space adjoining the building in the sum of $206.35; they also object to the account seeking to charge Charles Kotek for rental of the flat above the store for a period of eight years at $750 amounting to $5,760; they also object to the payment of $4,180 as salary of Agnes Kotek, wife of Fred Kotek for the years 1928, 1929, 1930 and 1931. Several

partnership; that the title was mortgaged to Jerry Lewis, Inc. and Bank and Jacquline Lotch, wife of Charles Lotch; that Charles Lotch owned at that time interest on a matrix judgment, and at his movement his wife Jacqueline was made one of the creditors in the land; that the building now on said lot was erected by the partnership in 1969 and 1970 at a cost of $18,000, of which $3,000 was provided by a loan and effectively equal set of partnership funds; that Jerry Lewis withdrew from the partnership in 1974 and contributed his interest in the partnership property to Charles and Jacqueline Lewis; that in payment of his interest in the partnership he received partnership money which he had contributed and in addition the partnership mortgage paid him $4,000, of which sum $2,000 was raised by Charles Lewis; that in January, 1977, Lewis Lumber Company paid $4,000 to Charles Lewis; that the partnership owed the Internal Revenue Service at 1972 and 1973 taxes, four months which were later levied on against the partnership in times of the above state; that the indebtedness of the partnership to the Revenue Service amounted to $1,314.30; sought leave plus a partnership account to plus reasonable fees expenditure; in will amount charging lotch is charged with collections monies totalling $2,040.00 during the years 1972, 1973 and 1974; defendants subject to said mortgage; defendants also subject in the line in said account showing collections by Charles Lotch of rentals at the above amounting $4,400 the sum total from partnership 1, 1972 to December 31, 1973; defendants also object to the account showing collections for which rents totalling the building in the sum of $800.00; they also object to the amount seeking to charge Charles Lotch for rental of the first floor the above for a period of eight years or $720 amounting to $4,320; they also object to the payment of $1,200 to Jerry Lewis, wife of Jacqueline Lewis for the years 1972, 1973, 1980 and 1981. Several

other objections were made to the account. The Master finds that the partnership did not keep any regular books of account. Receipts were given for moneys collected from customers; carbon copies of these receipts were bound in books and filed away for record; these receipt books were the only record the firm had; they were stored in the office and later removed to the boiler room; a certain portion of the receipt books were destroyed by Charles Kotek; the amounts collected by Charles Kotek that would be shown by books so destroyed amounted to $6,045.50; he is also chargeable with $5,760 collected by him from the store; he is not chargeable with the sum of $306.35 for the space adjoining the building; it was agreed that Charles was to have the use of the apartment in the building in return for services rendered by him and the sum of $5,760 is not a proper charge against him; that the expense of $314.93 incurred in repairs of said apartment is not a proper charge; that the salary of Agnes Kotek, wife of Fred Kotek, aggregating $4,160 is a partnership expense; that Charles Kotek purchased a lot in St. Charles on which he built a summer home and claims that his brother Fred was to have use of it and pay one-half of the expense of maintenance; that Fred had no interest in said home and the maintenance is not a proper charge against the partnership; that the expense of $300 loaned to one John Manek is not a proper charge against the firm; that the sum of $1,000 given as cash bail for Fred Kotek was eventually returned to the partnership and is not a partnership expense.

The Master finds that the following is a correct statement of the account between the parties:

RECEIPTS.

1.	Earnings collected by Fred Kotek	$ 55,541.61
2.	Earnings collected by Charles Kotek, shown by receipt books	102,308.24
3.	Earnings collected by Charles Kotek, receipt books for which were destroyed	6,045.50
4.	Rentals of store	4,755.00
	Total receipts	$169,350.35

other objections were made to the balance. The auditor finds that the guarantorship did not have any regular books of account. Receipts were given for money collected from guarantors; various books of these concerns were found in boxes and piles over the floor; there appeared needs when the only record the firm had; they were placed in the office and later removed to the boiler room; a careful getting of the results books were destroyed by burning alone; the records delivered by Jonathan Tufts that could be shown by books as destroyed amounted to $8,000.00; he is also responsible with $1,700 collected by him from the store; he is not responsible with the sum of $500.00 for the waste injuring the building; it was proved that Harding was to have the use of the storeroom in the building in return for services rendered by him and the sum of $1,700 is but a proper credit; that the expense of $111.88 incurred in repairs of said storeroom is not a proper charge; that the salary of Jesse Cook, with of that month, amounting $4,100 is a partnership expense; that Charles Lord commenced a lot in it. Charles in which an light a number land and stated that his brother-law was to have use of it and yet one-half of the expense of maintenance; that that has no interest to this room and the delivery is but a proper charge against the partnership; that the expense of $700 incurred in the lots house is not a proper charge against the firm; that the sum of $1,100 given as wage call for free rates and accordingly payment in the partnership and is not a partnership expense.

The auditor finds that the following is a correct statement of the account between the parties:

Assets.

1. Earnings collected by firm agent	$8,841.61
2. Earnings collected by Charles Lord, shown by receipts books	180,000.00
3. Earnings collected by Charles Lord, receipt books for which were lost	8,000.00
4. Rentals of store	2,000.00
Total assets	$198,000.00

DISBURSEMENTS.

5.	General Expenses and salaries		$111,993.76	
	Less the following items:			
	(a) Pennoyer Motor Co. . .	$ 80.00		
	(b) Cash bail returned . .	1,000.00		
	(c) Judson Co.	67.41		
	(d) Harding Motor Co. . .	162.85		
	(e) Adams State Bank . .	500.00		
	(f) Adams State Bank . . .	500.00		
	(g) Manek Loan	300.00		
	(h) St. Charles summerhome	1,105.19	. . 3,695.45	
				$108,298.31
6.	Expenses paid by Fred Kotek			1,548.45
7.	Salary of Agnes Kotek			4,160.00
8.	Amount advanced by Charles Kotek, with interest .			11,840.00
	Total Disbursements			$125,846.76
	Indebtedness still outstanding . .			1,912.25
	Total			$127,759.01

Total receipts	$169,250.35
Total disbursements and outstanding indebtedness	127,759.01
Net Profit	$ 41,491.34

One-half of the profit of said business due Fred Kotek		$ 20,745.67	
Fred Kotek is charged with the following amount drawn from partnership			$ 14,205.00
Amount collected by Fred Kotek		$ 55,541.61	
Paid to firm .	$46,530.50		
Firm expense paid	1,548.45		
Salary paid Agnes Kotek .	4,160.00	$ 52,238.95	
Retained from collections			$ 3,302.66
Total amount received by Fred Kotek			$17,507.66
Due Fred Kotek, as one-half net profit of firm.			20,745.67
Balance			3,238.01

Fred

That Frank Kotek is therefore entitled to an undivided one-half interest in the real estate of the partnership at 3911 West 26th Street and $3,238.01 balance due as his share of the firm profits.

Objections and exceptions were filed to the Master's report, in which detailed objection is made to each of the items charged against him, which objections were overruled, and the court entered a decree sustaining the report. The appeal here is from that decree.

[illegible]

5. General expenses and salaries	[illegible]
Less the following items:	
(a) Temperance motor co. . . .	80.00
(b) Cash sell returned . .	1,[illegible].00
(c) Jones co.	[illegible]
(d) Boston motor co. . .	187.00
(e) Adams state bank . .	200.00
(f) Adams state bank . . .	[illegible]
(g) Bank fees	[illegible]
(h) 15. Depreciation home [illegible] . .	3,[illegible].00

[illegible]

6. Expenses paid by year loans	1,[illegible].40
7. Salary of Jones Jackson	4,140.00
8. Lumber advanced by Jackson Lumber, with interest .	11,840.00
Total disbursements	[illegible]
Independence still outstanding . .	1,[illegible].[illegible]
Total	[illegible]
Total receipts	[illegible]
Total disbursements and outstanding liabilities	147,[illegible].01
Net profit	[illegible]
Due-bill at the mills at sale	
Business due from [illegible]	[illegible]
Rent items is charged with the following general drawn	
item particulars	[illegible]
Amount collected by	
Rent items	[illegible]
Paid to firm . [illegible]	
Site expense	
Paid	1,[illegible].[illegible]
Salary paid	
Lumber items .	[illegible]
Retained from collections	[illegible]
Total amount receipts by real items	[illegible]
Due real items, or due-bill and receipts of item	[illegible]
Balance	[illegible]

This item notes is therefore entirely to be credited as an individual due-bill issued in the usual method of the indebtedness of [illegible] that [illegible] carried out [illegible] 838.01 between the [illegible] of the item profits.

Objections and criticisms made [illegible] in his auditee's report, in which detailed objection is made to much of the items charged against him, which objections were overruled, and the audit entered a large surcharging the account. The effect of this is that [illegible].

Fred Kotek, the plaintiff, testified, in substance, and to the effect that in the year 1916, he, together with his brothers, Frank and Charles, entered into an oral partnership agreement, to engage in the moving and cartage business in the city of Chicago and suburbs; that in 1919, out of $6,000.00 of partnership funds, they purchased a lot located at 3911 West 26th Street in the city of Chicago, and that because of the fact that certain judgments existed against the defendant, Charles Kotek, the title to this property was taken by Fred Kotek, and Josephine Kotek, the wife of Charles Kotek, and that during the years 1919 and 1920, the partners erected a building on the land in question at a cost of $18,000.00, $12,000.00 of which was borrowed from a building and loan association, and the balance of the cost of the building was paid out of partnership funds; that in the year 1924 Frank Kotek withdrew from the partnership, and was paid the sum of $15,000.00, $8,000.00 of which was paid by the defendant, Charles Kotek, and that the witness and defendant, Charles Kotek, continued in the business; that at or about the time Frank Kotek withdrew from the business, he and his wife conveyed all their interest in the real estate to Charles and Josephine Kotek, in joint tenancy; that during the time the witness and the defendant, Charles Kotek, remained in partnership, the office of the business was at 3911 West 26th Street, where the principal portion of the business was conducted, and that the witness conducted a part of the business from his home at 5643 West 22nd Street, Cicero; that subsequently the witness and his brother had difficulties, and that the witness saw his brother burning receipt books in the boiler room of their place of business at 3911 West 26th Street, and that in reply to a question of the witness, Charles Kotek stated that what he was burning, was old records for which they had no room. This witness further testified to the effect that when the firm received an order for a job, an entry

First Bank, the plaintiff, testified, in substance, and to the effect that in the year 1924, he, together with his brothers, Frank and Charles, entered into an oral partnership agreement, to engage in the saving and carrying business in the city of Chicago and elsewhere; that in 1924, out of $[illegible] of partnership funds, they purchased a lot located at 1821 West 103rd Street in the city of Chicago, and that because of the fact that certain judgments existed against the defendant, Charles Kotek, the title to this property was taken by Ivan Kotek, and Charlotte Kotek, the wife of Charles Kotek, and that during the years 1924 and 1929, the partners erected a building on the land in question at a cost of $18,000.00, $12,000.00 of which was borrowed from a building and loan association, and the balance of the cost of the building was paid out of partnership funds; that in the year 1929 Frank Kotek withdrew from the partnership, and was paid the sum of $10,000.00; $5,000.00 of which was paid by the defendant, Charles Kotek, and that the attorney and defendant, Charles Kotek, continued in the business; that at about the time Frank Kotek withdrew from the business, he and his wife conveyed all their interest in the real estate to Charles and Charlotte Kotek, in joint tenancy; that during the time the attorney had the determination, Charlotte Kotek, resident in Czechoslovakia, the office of the business was at 1821 West 103rd Street, where the physical operation of the business was conducted, and that the attorney abandoned a part of the business from his home on 5847 West 22nd Street, Cicero; that subsequently the attorney and his brother had difficulties, and that the attorney and his brothers wrongfully commit waste in the entire room of their place of business at 1821 West 103rd Street, and that in order to a compromise of the attorney, Charles Kotek stated that when he was working, he did receive for which they had no name. This attorney further testified to the effect that upon his first arrival in Cicero for a job, he entry

was made in an order book, and that when the money in payment for the work was collected, receipts were given, and that a carbon copy of the amount received remained in the book, that when the receipts were all given out, the book was filed in the office, and that the firm had no other record of money received than the order and receipt books; that the witness had in his possession all the receipt books covering the period from 1924 to 1931, except certain of such books as had been destroyed. The witness here submitted a detailed statement of what he claimed to have been the amount collected by him, and the amount collected by the defendant, as shown by certain of the receipt books. Other witnesses testified to the fact as to the destruction of certain receipt books by Charles Kotek. There was also introduced in evidence certain order books showing the items considered by the court.

The defendant, Charles Kotek, testified to the effect that in the year 1912 he was associated in business with his brother Frank; that in 1916 Fred Kotek was taken into the partnership, and that in 1924 Frank Kotek withdrew; that there were never any written partnership agreements; that the books of the partnership consisted of order books, a diary, some receipt books, and the personal record of the witness, besides check books and the bank book, and that the witness had charge of the records for one year; that Fred Kotek had special records which he, the witness, testified he had never seen; that the witness had records for his place at 3911 West 26th Street, and that Fred Kotek had the records for the 22nd Street place; that each January first, Fred Kotek took all the records and made out the income tax return; that the records were kept in a safe, and that Fred Kotek was the only one who could open it, and that this included the records from both places of business. This witness denied that he ever burned any records or receipt books, or other books; that he offered plaintiff

was made it in other hand, and that when the money in payment for the work was delivered, receipts were given, and that a person only of the common reputed ancestors in the town, that when the receipts were all given out, the town was filled in the action, and that the film had be-come proof of money received from the order and receipt book; that the witness had in his possession all the receipt books covering the period from 1847 to 1851, except certain of such books as had been destroyed. The witness then identified a document statement of what he claimed to be from the account maintained by him, and the amount entered in the Ledgers, as shown by entries of the receipt books. Other witnesses testified to the fact as to the destruction of certain receipt books by fire-in-law events. There was also introduced in evidence certain other Ledgers showing the items contained by the court.

The defendant, Martin Stone, testified to the effect that in the year 1857 he was engaged in business with his brother Joseph; that in 1859-1860 both was taken into the partnership, and John is 1859 there was joint ownership; that after some period of the partnership, the brothers had enough for the place of 1861 was over, and that the business had enough for the same interest place; that each Joseph first, the Stone had all the income and made out the income the period; that the income made Aug 14 a note, and that that note was the only one the Stone ever it, and that this included the receipts from both places of business. This witness testified that he ever borrowed any receipts or receipt books, or other books; that he delivered identical

$10,000.00 for his interest in the partnership, which he had refused, and that this offer was made in 1932; that whenever he, the witness, collected any moneys, he deposited them to the account of Kotek Brothers in the Adams State Bank, and that all receipt books were taken by Fred Kotek. He testified to the effect that under the agreement between the parties, he was to occupy a six room flat at 3911 West 26th Street, and that Kotek Brothers were to occupy the entire first floor; that the witness was to keep the building in shape, do the janitor work and keep the place heated, and that he was to pay no rent for the flat; that this agreement was made with the plaintiff, and that no rent was ever demanded of him. He denied that he ever collected any moneys on account of Kotek Brothers which he had not accounted for.

Plaintiff urges as grounds for reversal a general statement as to the rule with respect to the weight and sufficiency of the evidence in suits for partnership accounting, and that while books of account of a partnership are prima facie correct as between the partners, they are not conclusive, and that if they cover but a part of the partnership existence and are shown to be so erroneous as to destroy confidence, they are not proper basis for an accounting. Citing cases.

The Master had before him all of the available books, and documents, showing the condition of the account between these parties. He also heard the witnesses on the question as to whether or not the defendant had destroyed a part of the partnership books, as charged by plaintiff. In Pasedach v. Aux, 346 Ill. 491, the Supreme Court said:

"The master in chancery saw the witnesses and heard them testify. It was his province in the first instance to determine the facts. While his finding of facts does not carry the same weight as the verdict of a jury, nor of a chancellor where the witnesses have testified before him, yet the master's findings

$10,000.00 for the interest in the partnership, which he had refused, and that this offer was made in 1929; that however he, the witness, collected any money, he deposited them to the account of Joyce Brothers in the Union Bank; but that all records which were taken by land total. He testified to the letter that under the agreement between the parties, he was to receive a six year lease at $20 that date stated, and that Joyce brothers were to occupy the entire first floor; that the witness was to keep the building in shape, do the janitor work and keep the place heated, and that he was to pay no rent for the first; that this agreement was made with the plaintiff, and that to that was never terminated or late. He denied that he ever collected any money on account of Joyce Brothers which he was not accounted for.

Plaintiff argue on grounds for reversal a general statement as to the full with subject to the right and multiplicity of the witness in a lie for interesting accounting, and that their books of account of a partnership are prima facie evidence as between the partners, they are not conclusive, and that if any number but a part of the partnership relations and are found to be as proposed as to destroy conditions, they are not taken their to be accounting, citing Tuck.

The Judge had before him all of the available books, and documents, covering the qualities of the amounts involved where matters. He also heard the witnesses on the question as to whether or not the defendant had destroyed a part of the partnership books, he charged by plaintiff. In Blackburn v. Jones, 4 Ga. App. 221, the Supreme Court said:

> "The duties of discovery and the attorneys and being true tacitly. If was his position in the first instance to determine the fact. While the finding of trial judge has not every the same relief as the verdict of a jury, yet it a decision where the witnesses have testified before him, yet the master's findings

are entitled to due weight on review of the cause. (Keuper v. Mette, 239 Ill. 586.) His conclusions as to the facts have been approved by the chancellor. In that situation we are not justified in disturbing the findings unless they are manifestly against the weight of the evidence. North Side Sash and Door Co. v. Hecht, 295 Ill. 515; Klekamp v. Klekamp, 275 id. 98."

In view of the state of the record, we do not feel that we would be justified in disturbing the Master's findings and the decree of the Superior Court of Cook County. The judgment is, therefore, affirmed.

JUDGMENT AFFIRMED.

HEBEL, P.J. AND DENIS E. SULLIVAN, J. CONCUR.

are entitled to the relief on review of the issue. (Spencer v. State, 687 III. 488.) His conclusions on the tests are based solely on the discretion. In that situation we are not justified in disturbing the findings unless they are manifestly against the weight of the evidence. People ex rel. and Jones v. Bender, 338 Ill. 61; People v. Williams, 14 Ill. 2d.

In view of the state of the record, we do not feel that we would be justified in disturbing the Court's findings and the decree of the Superior Court of Cook County. The judgment is, therefore, affirmed.

JUDGMENT AFFIRMED.

McGURE, P.J., and MORAN, J., concur.

39856

ELSIE SANDERS,

Appellant,

v.

METROPOLITAN LIFE INSURANCE COMPANY,
a corporation,

Appellee.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

26 A

296 I.A. 641

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

Plaintiff, the widow of John Sanders, deceased, brought suit against the defendant company on a life insurance policy issued by this company to her husband in his lifetime, in which she is the named beneficiary. The cause was submitted to a jury, which returned a verdict in favor of plaintiff for the sum of $1,500.00, the amount of the death benefits under the policy. A motion was made by defendant for a judgment notwithstanding the verdict. The court sustained the motion and entered judgment for plaintiff in the sum of $155.00. How this amount was arrived at, the record does not indicate. This is an appeal by plaintiff from this judgment.

The current premium on the policy issued to the insured became due August 14, 1932, and plaintiff testified that on September 16, 1932, which was after the thirty day grace period in the policy for the payment of premiums had expired, the insured paid to a collector for the defendant company the amount of this premium. This is denied by the collector, who testified that the premium was not paid until October 11, 1932. On October 11, 1932, the insured signed a document, entitled, "Application to the Metropolitan Life Insurance Company for reinstatement of * * * policy." In that document the insured stated that he was at that time in sound health, that since the date of the policy he had had no illness or injury, and that he had not consulted a physician. The application for

[illegible]

[illegible]

[illegible]

v.

[illegible]

[illegible]

[illegible]

reinstatement also contained a recitation that "I hereby certify that the foregoing statements and answers are wholly true and have been made by me to induce the Metropolitan Life Insurance Company to reinstate the above policy, and I agree that if said company shall grant such reinstatement, the same shall be admitted to be based exclusively upon the representations contained in this request, and upon the express condition that if the foregoing statements be in any respect untrue, said company shall, for a period of two years from the date of such reinstatement, be under no liability by reason of the attempted reinstatement of the policy, except that the company shall return to the insured, or to his personal representative, all premiums paid since the date of said reinstatement".

The insured, at the times mentioned, was employed by the Sinclair Refining Company as a gas station attendant. Plaintiff further testified to the effect that on October 11, 1932, her husband returned from work at about 10 o'clock at night, and that between 11 and 12 o'clock of the same night he became ill, and that she called a Dr. Tolbert to attend him; that this doctor gave him some medicine for a cold; that before that time, the insured had had no cold nor cough, and had not expectorated any sputum nor blood, nor had he lost any weight, nor had he suffered from fatigue, that he had no chest pains or night sweats, and that he had had no doctor to attend him before that time; that this doctor at the time mentioned told her husband to stay in bed and gave him some medicine for his nose, and that this doctor later made several visits and advised her husband to stay in bed and take a rest and take medicine; that after that, this doctor made several visits but did not take any sputum for examination during the first week; that after about two weeks, the insured was able to be out and around and called at the doctor's office; that during all this time, her husband was suffering from a "terrible cold", but seemed to be improving under the doctor's

reinstatement also contained a condition that "I hereby certify that the foregoing statements and answers are wholly true and have been made by me in order to induce the Continental Life Insurance Company to reinstate the above policy, and I agree that if such company shall grant such reinstatement, the same shall be construed to be based exclusively upon the representations contained in this document, and upon the express condition that if the foregoing statements or in any request herein, with respect thereto, the insured of the right of such reinstatement, or under no liability by reason of the attempted reinstatement of the policy, return just the company shall return to the insured, or to his personal representative, all premiums paid since the date of said reinstatement".

The insured, at the time mentioned, was employed by the Illinois Central Railroad as a gas station attendant. Plaintiff further testified to the effect that on October 11, 1933, her husband returned from work at about 10 o'clock at night, and that between 11 and 12 o'clock of the same night he became ill, and that she called a Dr. Tuckers to attend him; that this doctor gave him some medicine for a cold; that before that time, the insured had had no cold nor cough, and had not experienced any symptoms thereof, nor had he lost any weight, nor had he suffered from fatigue, that he had no chest pains or night sweats, and that he had no doctor to attend him before that time; that this doctor at the time mentioned told her husband to stay in bed and gave him some medicine for his head, and that this doctor later made several visits and advised her husband to stay in bed and take a rest and take medicine; that after that, this doctor made several visits but did not take any steps for examination during the first week; that after about the second, the insured was able to be out and around and called at the doctor's office; that during all this time, her husband was suffering from a "terrible cold", but seemed to be improving under the doctor's

treatment, and that the improvement continued for two or three months; that thereafter about May, 1933, the insured was taken to the Cook County Hospital, and that he died there on August 11, 1933. She also testified that while in the hospital, he was treated by Dr. Tolbert and the doctors at the Cook County Hospital.

Two witnesses produced by plaintiff testified in her behalf, and each to the effect that they had known the insured in his lifetime and for more than a year prior to October 11, 1932; that during that time he always looked healthy, that they had never known him to be sick, and that his weight was from 165 to 170 pounds. The manager of the Sinclair service station where the insured was employed at the time he was taken ill, testified to the effect that he had known the insured for six or seven years, during all of which time the insured worked for the Sinclair Refining Company, and that he, the witness, had observed the insured while he was working; that during the month of October, 1932, the weather was rainy and bad, and that the duties of the insured required him to be out in the open during inclement weather; that he saw the agent for the insurance company two or three days before Sanders, the insured, was sent home from work because of sickness, and that at that time, the agent gave Sanders a receipt for the money paid; that during the last week Sanders worked for the company, he appeared to be all right, except that he had a cold, and that during that time Sanders worked in his regular way, and that he was always a good worker.

Dr. Tolbert, the physician to whom plaintiff referred in her testimony, who was called as a witness by defendant, and who received a fee from defendant for attendance in court, on his direct examination testified to the effect that he first saw the insured on October 11, 1933, and that he then made an examination and procured the history of the insured. This witness testified, in substance,

treatment, and that the improvement continued for two or three months; that thereafter about July, 1[illegible], the insured was taken to the Cook County Hospital, and he died there on August 1[illegible], 1[illegible]. The plaintiff was with him while in the hospital, he was treated by Dr. Tolbert and the doctors at the Cook County Hospital.

The witnesses produced by plaintiff testified in her behalf, and made it the effect that they had known the insured in his lifetime and for more than a year prior to October 1[illegible], 1[illegible]; that during that time he always looked healthy, that they had never known him to be sick, and that his weight was from 1[illegible] to 1[illegible] pounds. The manager of the fraternal service station where the insured was employed at the time he was taken ill, testified to the effect that he had known the insured for six or seven years, during all of which time the insured worked for the Illinois Central Railroad, and that he, the witness, had observed the insured while he was working; that during the month of October, 1[illegible], the weather was rainy and bad, and that the duties of the insured required him to be out in the open during inclement weather; that he saw the insured for the last time approximately two or three days before Tuesday, the insured, was sent home from work because of sickness, and that at that time, the agent gave Hughes a receipt for the money paid; that during the last week Hughes worked for the company, he appeared to be all right, except that he had a cold, and that during that time Hughes worked in his regular way, and that he was always a good worker.

Dr. Tolbert, the physician to whom plaintiff referred in her testimony, who was called as a witness by defendant, and who received a fee from defendant for attendance in court, on his direct examination testified to the effect that he first saw the insured on October 1[illegible], 1[illegible], and that he then made an examination and recorded the history of the insured. This witness further, in substance,

that the insured told him he had worked all that day; [October 11, 1932];that at the time mentioned the insured was coughing and complaining of pains and aches through his body and limbs; that at that time Sanders had a temperature of 101.8, a rapid pulse of 110 and some rales were found in the apex of his lungs; that he, the witness, made a diagnosis of probable tuberculosis at that time, but he did not take any sputum. He took samples of sputum within a week and had it examined, and from this last examination he concluded that the insured had tuberculosis on October 11, 1932.

In its brief, defendant insists that this doctor testified that upon the first examination he diagnosed the illness of the insured as tuberculosis. An examination of the testimony of this witness, as set forth in the abstract, indicates that he made no such positive statement. He testified that upon a subsequent test, he confirmed the diagnosis made at the first examination. What he based his diagnosis upon, when first made, he did not say. He also testified as to what conclusions are to be reached where the tubercular germ is found to be present, but, as suggested, he nowhere in his testimony states that he found any such condition at the first examination. On cross-examination, this witness stated that "it wouldn't take very long for one to become ill by influenza. A man may be in excellent health this minute and in the next hour he may be very sick from influenza." On cross examination, this witness was asked this question: "How long in your opinion did the deceased suffer from this disease or impairment?", to which he answered: "Since October 11, 1932. To my knowledge he wasn't afflicted before that."

Another physician called by defendant, who examined the insured while he was in the hospital and apparently made a complete diagnosis of the physical condition of the deceased, and who described the symptoms usually manifest in one who is afflicted with tuberculosis,

that the inquiry held sway on the second all that day; October 11, 1924]; that at the time mentioned the inquiry was changing and commencing of pains and aches through his body and limbs; that at that time Kenyon had a temperature of 101.4, a rapid pulse of 110 and some rales were found in the apex of his lungs; that he, the witness, made a diagnosis of probable tuberculosis at that time, but he did not take any sputum. He had spasms of emotion within a week and had it examined, and from this last examination he concluded that the impaired had tuberculosis on October 11, 1924.

In his view, Hammond insists that this tuberculosis existed prior to the first examination in disproved the illness of the insured as tuberculosis. In examination of the testimony of this witness, it was found in the abstract, indicates that he made no such positive statement. He stated that upon a subsequent test, he confirmed the diagnosis made at the first examination. That he based his diagnosis upon, when first made, he did not say. He also testified as to what specimens are to be produced where the tuberculosis germ is found to be present, but, as mentioned, he nowhere in his testimony states that he found any such condition at the first examination. On cross-examination, this witness stated that his opinion's that very lady for one to become ill by influenza. A man may be in excellent health this minute and in the next hour he may be very sick from influenza." On cross-examination, this witness was asked this question: "Now isn't in your opinion did the deceased suffer from this disease or influenza?", to which he answered: "Since testing it, yes. To my knowledge he never suffered before that."

Another physician called by Prudential, who examined the insured while he was in the hospital and apparently made a complete diagnosis of the physical condition of the insured, and who described the symptoms usually obtained in one who is afflicted with tuberculosis,

testified to the effect that after refreshing his recollection from his records, he was of the opinion that the insured was suffering from tuberculosis for at least one year prior to July, 1933; that he had a talk with the insured while he, the insured, was in the hospital, and that the witness was told that the insured had been sick for a year previous to July, 1933. On cross examination this doctor testified that a person could have pulmonary consumption and not know about it. Also, that he treated the insured on July 11, 1933. This witness also received a fee from defendant.

Defendant insists that the answers made by the insured in his petition for reinstatement to the effect that he was in sound health, that since the date of the issuance of the policy he had had no illness and had not consulted a physician, were false and untrue, and were known to be so by Sanders, and that these false statements were made for the purpose of inducing defendant to reinstate the policy of insurance. They aver that as a matter of fact, Sanders was not in sound health on October 11, 1932, but that at that time he was suffering from pulmonary tuberculosis, and had consulted a physician because of such disease.

As we view the record, the testimony of all the witnesses in this case, including the testimony of the two physicians who testified for defendant, we draw the conclusion that at the time the insured made the statement that he was in good health, there was nothing in his outward physical condition to indicate that he was suffering from any disease, and that he made the statement in good faith. The testimony of both of the physicians is so indefinite as to how long it takes for this disease to develop that it is of slight aid in determining the issues in this case. The jury xxxxd saw the witnesses and heard all this testimony and apparently

testified to the effect that after reviewing the revelations from his persons, he was of the opinion that the insured was suffering from hypertension for at least one year prior to July, 1920; that he had a talk with the insured while he, the insured, was in the hospital, and that the witness was told that the insured had been sick for a year previous to July, 1920. On cross examination this doctor testified that a person could have hypertension consequtive and not know about it. Also, that he treated the insured on July 11, 1920. This witness also received a few more statements.

Defendant insists that the answers made by the insured in his petition for reinstatement to the effect that he was in sound health, that since the date of the issuance of the policy he had no illness and had not consulted a physician, were false and untrue, and were known to be so by insured, and that these false statements were made for the purpose of inducing appellee to reinstate the policy of insurance. They say that as a matter of fact, insured was not in good health on October 11, 1921, but that at that time he was suffering from pulmonary tuberculosis, and had acquired a physician because of such disease.

In so view the record, the testimony of all the witnesses in this case, including the testimony of the physicians who testified for defendant, we find the positive fact as the fact the insured made the statement that he was in good health, there was nothing in his outward physical condition to indicate that he was suffering from any disease, and that he made the statement in good faith. The testimony of both of the physicians is so indefinite as to our mind as to fail to establish so certain that it is of right aid in determining the issues in this case. The jury heard and the witnesses and heard all this testimony and apparently

concluded from it that the insured honestly made the statement contained in his application for the reinstatement of his insurance as to the condition of his health, and we are not prepared to say that the jury was wrong in concluding that it was not shown that he was suffering from tuberculosis when he signed the application for reinstatement. Therefore, we are of the opinion that the trial judge was in error when he set aside the verdict and entered the judgment which he did. It is, the order of this court that the judgment be reversed and judgment be entered here for plaintiff for the sum of $1,500.00.

JUDGMENT REVERSED AND JUDGMENT
ENTERED HERE FOR $1,500.00.

HEBEL, P.J. AND DENIS E. SULLIVAN, J. CONCUR.

excluded from it that the learned judge made the statement contained in his instruction for the reinstatement of his language as to the condition of his health, and he is not convinced to say that the jury was wrong in concluding that it was not shown that he was suffering from nervousness when he signed the application for reinstatement. Therefore, we are of the opinion that the trial judge was in error when he set aside the verdict and entered the judgment which he did. It is, the order of this court that the judgment be reversed and judgment be entered here for plaintiff for the sum of $1,500.00.

Judgment reversed and judgment entered here for plaintiff for the sum of $1,500.00.

Kent, P.J. and Hall v. Doherty, J. concur.

39868

NATHANIEL RUBINKAM,

Appellee,

v.

GLEN FALLS INDEMNITY COMPANY, a New York Corporation,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

296 I.A. 641[3]

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

Plaintiff recovered a judgment against defendant in the Municipal Court of Chicago for the sum of $513.28 upon the verdict of a jury. The action is predicated upon an accident insurance policy issued by the defendant company. The policy provides for the payment of an "accident indemnity for loss * * * resulting directly and independently of all other causes from accidental bodily injuries." The policy also provides that it "shall not cover * * * disability or other loss caused directly or indirectly, wholly or partly, by bodily or mental infirmity, by bacterial infections (except pyogenic infections which shall occur with and through an accidental cut or wound) or by any other kind of disease, or by medical or surgical treatment (except such as may result directly from surgical operations made necessary solely by injuries covered by this policy and performed within ninety days after date of the accident.")

Plaintiff testified that on August 27, 1934, at about 11 o'clock in the evening he visited a restaurant in the city of Chicago, and ate two cold lobsters and drank three, four or five steins of beer, and that he arrived home about 1 o'clock in the morning; that later in the night he was awakened by a sudden sharp pain in the lower part of the region of the bowel near the right side below the navel; that the pain was so sharp and prolonged that after about an hour, Doctor N. C. Gilbert was called, and that this doctor arrived

about 8 o'clock in the morning and recommended that the plaintiff be taken to St. Luke's Hospital, where he arrived at about 10 o'clock that morning; that Doctor Harry E. Mock was then called, and that at that time, the pain was so intense that Doctor Mock subsequently operated upon the plaintiff, and that he was in the hospital for 16 days, and until September 13, 1934. The Doctor Mock referred to, testified for plaintiff and to the effect that on the morning of August 28, 1934, between the hours of 9 and 11 o'clock, he made a complete physical examination of the plaintiff and made a diagnosis of his condition; that he found the abdomen distended, extremely tender and somewhat rigid; that with a stethoscope he could hear peristaltic waves and increased peristalsis; that a peristaltic wave is a normal wave that keeps the bowels moving; that about 6 o'clock the next morning he received a 'phone call that plaintiff was worse; that he was positive that there was an intestinal obstruction, which had reached a complete stage, and that he advised an operation; that on August 29th following, in the operating room of the hospital he operated on the plaintiff, made an incision five or six inches long, and that he found a large distended loop of gut which was ballooned out several times its normal size, and that it was four or five inches in circumference; that he found the gut kinked around an adhesion, which is a band of scar tissue; that the adhesion had twisted around the ileum so that it formed an obstruction to the bowel; that the adhesion was removed from the ileum and from the abdominal wall, and the bowel then unkinked, untwisted and immediately this ballooned out portion filled with air, showing that the obstruction was relieved. He also testified that the bowel, both in the neighborhood of this kinking and above that point, was dark blue in color, due to the shutting off of the blood supply; that he applied hot towels, and that within the time mentioned by the plaintiff in his testimony,

about 8 o'clock in the morning and experimented with the electricity
in exactly the same way as on Sunday, where he returned at about 10 o'clock
that morning; this Doctor Percy X. Bank was then with, and that
at that time, he did not observe that Doctor Bank unnecessarily
operated upon the electricity, and this he was in the hospital for
10 days, and until September 13, 1924. The Doctor does mistrust it,
testified for plaintiff and in the affect that in the morning of
August 30, 1924, between the hours of 9 and 11 o'clock, he made a
complete physical examination of the plaintiff and made a diagnosis
of his condition; that he found the patient distended, extremely
tender and somewhat rigid; that with a stethoscope he could hear
peristaltic noise and increased peristalsis; that a peristaltic wave
is a normal wave that keeps the bowels moving; that about 8 o'clock
the best method to produce a 'phone call that plaintiff was worse;
that he was positive that there was no intestinal obstruction, which
had reached a complete stage, and that he noticed no diverticulum; that
on August 29th following, in the afternoon from of the hospital he
operated on the plaintiff, made an incision five or six inches long,
and that he found a large distended loop of gut which was bulging
out several times its normal size, and that it was four or five inches
in circumference; that he found the gut tightly twisted on himself,
which is a kind of gut blocks; that the adhesions had twisted around
the ileum so that it formed an obstruction to the bowel; that the
adhesion was removed from the ileum and from the descending colon, and
the bowel then untwisted, unwinded and immediately this ballooned out
portion filled with air, showing that the obstruction was relieved.
He also testified that the bowel, both in the neighborhood of this
kinking and above that point, was very blue in color, due to the
shutting off of the blood supply; that the condition of bowels, but
that within the time mentioned by the plaintiff in his testimony,

plaintiff recovered and was discharged. On cross-examination, this doctor testified that the band of scar tissue which was stretched across ~~xxxxxxxxxxx~~ from the abdomen to the ileum was not in a normal condition, and that such a condition usually follows disease or operations. The witness was asked this question: "So that this abnormal band of adhesion was found by you right at the point where this stoppage occurred". Witness's answer: "That is right". This doctor further testified on cross-examination that below the adhesion the bowel was collapsed, was not distended or lopped or looped over, and that all about that band of adhesion was the kinked or twisted gut, that above the point of the twisting it was distended, that the adhesion which the witness found in the abdomen had something to do with the kinking of the bowel, and that the adhesion contributed to some extent to the kinking of the bowel and the obstruction. He also testified that when he opened the abdominal wall, he "found this adhesion, found the seat of the trouble."

Another doctor testifying for the defendant, who was asked to assume the facts testified to by both the plaintiff and Doctor Mock, testified that in his opinion the adhesion testified about caused the kinking and twisting in the bowel. It is not denied that prior to the occasions in question, plaintiff had been operated on for appendicitis, and that the adhesions referred to were the result of this operation. Defendant offered to prove by plaintiff that he had previously suffered similar attacks, subsequent to his operation for appendicitis, but the court rejected the offer. We are of the opinion that this was error.

We can arrive at no other conclusion than that the adhesion referred to in the testimony was an efficient and contributing cause to plaintiff's ailment. It seems apparent from the testimony of all the witnesses, including that of plaintiff, that the character

plaintiff recovered and was disinherited. In cross-examination, this doctor testified that the head of Lady Alwood which was struck across xxxxxxxxxxxxxxx from the window to the floor was not in normal condition, but that such a condition usually follows disease or contusion. The witness was asked this question: "Do you find this abnormal head of character are found by you right at the point where this struck occurred". Kinsey's answer: "That is right". This doctor further testified on cross-examination that before the adhesion the head was cultivated, and that afterwards it appear or looked sore, and that it did show that such of adhesion was the cause of the injury, but that above the level of the injuries it was disturbed, that the adhesion which the witness found in the interior was consisting to be also the cracking of the bones, and that the adhesion contributed to some extent to the injury of the bones and the abstraction. He also testified that that he opened the abdominal wall, he "found this adhesion, found the rent of the intestine."

Another doctor testifying for the defendant, who was asked to assume the facts testified to by both the plaintiff and Doctor Kinsey, testified that in his opinion the adhesion testified about caused the injury and bleeding in the bowel. It is not denied that under the instructions in question, plaintiff had been ever-ready to the accomplishing, and that the objections raised to over the result of this operation. Defendants attempt to show by plaintiff that he had previously suffered similar injuries, commencing in the operation the accomplishing, but the court rejected the offer. In view of the opinion that follows this error.

In the letter of Dr. Arthur Sullivan which bore the "Service relative to the testimony for the plaintiffs and contributing cause to plaintiff's illness. It seems impossible from the testimony of all the witnesses, including that of plaintiff, that the character

and amount of food and liquid which plaintiff had taken into his digestive tract, was more than the capacity of the bowel at the particular region where the adhesion existed, that if he had had similar attacks before, he knew what the result might be, and that there was nothing accidental about it. The court was in error in submitting the case to a jury, and should have directed a verdict of not guilty.

The judgment is, therefore, reversed and judgment is entered here against plaintiff for costs.

REVERSED AND JUDGMENT HERE AGAINST
PLAINTIFF FOR COSTS.

HEBEL, P.J. AND DENIS E. SULLIVAN, J. CONCUR.

and amount of food and liquid taken yesterday but taken into his digestive tract, was most like the majority of the local in the particular region where the admission related, that if he had had similar attacks before, he then and the result might be, and that there was nothing accidental about it. The court was in error in submitting the case to a jury, and should have directed a verdict of not guilty.

The judgment in, Superior, reversed and judgment is entered here against plaintiff for costs.

DAVIDSON and TAYLOR, JJ. CONCUR.

WILLIAM, C.J. AND TRUITT, J. DISSENT.

39915

NELLIE JONES,

Appellee,

v.

CITY OF CHICAGO, a Municipal Corporation,

Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

28A

296 I.A. 641

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment of the Circuit Court of Cook County entered on the verdict of a jury in an action brought by plaintiff against the defendant for damages alleged to have been sustained by her, caused by her falling into an open hole in a public street.

Plaintiff testified to the effect that about noon on the 24th day of February, 1936, she alighted from a southbound car at the southwest corner of the intersection of 47th Street and St. Lawrence Avenue in the city of Chicago; that after alighting from the car, she went north across the west side of St. Lawrence Avenue towards the northwest corner of the street intersection, and that before she reached the northwest corner, she fell into a hole in the street, "down almost to her waist"; that at that time, the hole was unguarded and filled with water, and that she suffered severe bruises and cuts.

There is no question raised as to the amount of the damages, the only question being as to the liability of the defendant, and we will, therefore, direct the remainder of our remarks to that question and to the evidence bearing thereon.

A witness for plaintiff who lived in the neighborhood of the accident, testified that on the day in question about midday he had occasion to be in the vicinity of the intersection of the streets mentioned; that when he was about 100 feet from the corner he saw the plaintiff after she had fallen into the hole, which was at the

northwest corner of the intersection, and that he observed that there was a lot of water around the hole, and that her leg was down in the hole; that "there was no block there. There was nothing to keep her from coming across. All I could see was a lot of water there." This witness testified to the effect that he saw a workman who was "trying to put up * * * some block he had", and that at that time, he gave plaintiff his name and address. On cross-examination, this witness testified to the effect that the workman he saw at the time and place of the accident was putting up a block or barricade after the lady had fallen; that there were quite a few men working there; that he saw a plank lying down near the curb, and that he saw a plank lying across the hole. He also testified on cross-examination to the effect that he could not remember the particular month in which the accident happened, whether there was snow on the ground or not, or whether the weather was below zero at the time.

Another witness for plaintiff testified, in substance, that he was in the vicinity of 47th Street and St. Lawrence Avenue on the day and hour in question; that prior thereto he had known plaintiff for seven or eight years as a member of a church of which he was also a member; that he was starting north across the street at the intersection on the west side of St. Lawrence Avenue when he first saw the plaintiff; that "she was lying down right in the hole. It was located on the northwest corner of 47th Street. I was just across the street on the other side of the street. I ran over there but by the time I got there two other gentlemen had pulled her out. I recognized her." He also stated that in his opinion, the hole was pretty deep, that it ran from a depth of about eighteen inches and increased to about five feet near the curb of the sidewalk; that there was no guard on the sidewalk. On the east side of the hole there was a board standing out in the street, but in the street there

wasn't anything around the curb or by the curb. This witness stated that the hole had been open for three or four days, and that men were working cutting off and rounding the curbs, and that the men picked plaintiff up and took her away. On cross-examination, this witness testified that there was a board barricade at the place in question just east of the hole in the street, but that west of the hole there was nothing. He also stated that there could have been piles of dirt around the hole, but that he did not notice particularly whether this was true or not; that the hole was about two feet deep; that he couldn't see the bottom of it, that the hole was full of water, and that the did not go over and look that closely; that because of the hole and a prop in the street, he was unable to walk straight to the sidewalk, and that there were no holes in the street except at the curb. He also testified that at the time of the accident, no workmen were present.

A police officer of the City of Chicago testified that during the month of February, 1938, and on the day in question, he passed the intersection at which the accident occurred, a number of times, and that he recalled seeing work being done at the corner where workmen were rounding out a curb; that the work consisted of cutting the corners off, which required the moving of a post at the corner, and that the workmen cleared the curb and left a hole. He also testified to the effect that while the workmen were so engaged, barricades had been erected to keep people from walking across the corner, and that as he passed this, he noticed the barricades, which were wooden horses of the kind that are usually used for barricades, and that to the best of his recollection, they covered both corners. He was asked whether at any time during the progress of the work, these barricades had disappeared, and his answer was that he noticed the barricades at the corner at all times when he passed. On cross-examination, he stated that there was an undertaking establishment

wasn't anything around the part of or of the body. This witness stated that the hole had been upon the three or four days, and that you were working during off and tending the works, and that the was closed plaintiff up and took her away. On cross-examination, this witness testified that there was a house adjoining to the place in question just west of the hole in the street, but that west of the hole there was nothing. He also stated that there would have been piles of dirt around the hole, but that he did not notice particularly whether this was true or not; that the hole was about ten feet deep; that he doesn't see the bottom of it, that the hole was full of water, and that he did not go over and look this closely; that because of the hole and a pipe in the street, he was unable to walk straight to the sidewalk, and that there were no holes in the street except at the curb. He also testified that at the time of the accident, no persons were present.

A police officer of the city of Chicago testified that during the month of February, 1929, and on the day in question, he passed the intersection at which the accident occurred, a number of times, and that he received evidence were being done at the corner where workmen were tunneling out a curb; that the work consisted of cutting the concrete off, which required the moving of a post at the corner, and that the workmen placed the curb and left a hole. He also testified to the effect that while the workmen were so engaged, barricades had been erected to keep people from walking across the corner, and that as he passed this, he noticed the barricades, which were wooden horses of the kind that are usually used for barricades, and that to the best of his recollection, they covered both corners. He did notice whether at any time during the progress of the work, these barricades had disappeared, and his answer was that he noticed the barricades at the corner at all times when he passed. On cross-examination, he stated that there was no underpinning established

there at the corner, and that the work was being done right in front of the door of this institution. Another police officer testified to substantially the same state of facts as the witness just mentioned.

A student from the Flower Technical High School, located near the northwest corner of St. Lawrence Avenue and 47th Street, testified to the effect that she attended this school on the day in question; that she went to school on the morning of that day and passed this intersection; that in going to school, she walked on the west side of St. Lawrence Avenue, and then crossed over to the east side; that she remembered the curb at the corner in question in front of the undertaking establishment, which is on the northwest corner; that after the work was started, she had to walk out in the street because "there was a horse there", and that she walked in between the horse and the building on the corner. She also testified that "those horses were there all the time they were working on the curb. I passed there every day." On cross-examination she stated that the work and condition of the corner of the street was nothing out of the ordinary, and that she was not impressed by it; that she remembered the barricades around the hole. She testified further to the effect that whenever she passed this place, the barricades were up.

A project superintendent for the W. P.A. testified that he was a supervisor over the district which included the point in question, and that he had occasion to inspect the work being done at the corner in question twice every day; that just before the concrete was broken at the particular curb, there was a three way barricade erected, two barricades to prevent vehicle traffic from coming to any harm at the excavation, and one to prevent pedestrian traffic from coming to any harm; that these barricades were watched

there at the corner, but that the work was being done right in front of the door of this institution. Another police officer testified to substantially the same state of facts as the witness just mentioned.

A request from the Tower Protective Club Council, located near the northwest corner of 7. Lawrence Avenue and 47th Street, testified to the effect that she attended this school on the day in question; that she went to school on the morning of that day and passed this intersection; that in going to school, she walked on the east side of 7. Lawrence Avenue, and then crossed over to the west side; that she proceeded the east of the corner in question in front of the underground excavation, which is on the southwest corner; that after the work was started, she got to walk out in the street because "there was a ditch there", and that she walked in between the ditch and the building on the corner. She also testified that "these horses were there all the time they were working on the curb. I passed there every day." On cross-examination she stated that the work was not condition of the corner of the street was building out of the building, and that she was not interested by it; that she remembered the horses around the hole. The testified further to the effect that whenever she passed this place, the horses were up.

A policeman superintendent for the 5. T.A. testified that he was a supervisor over the district which included the point in question, and that he was connection to inspect the work being done at the corner in question twice every day; that just before the concrete was poured in the particular curb, there was a three-inch partitude erected, for protection to prevent vehicle traffic from coming to any harm at the excavation, and one to prevent pedestrian traffic from coming to any harm; that these partitudes were welded

on both sides by foremen during the daylight hours and protected by signals and lanterns during the night hours; that the witness made two tours both during the day and night, and that during the entire time this work was in progress, there were barricades about it every day; and that if they had not been there, he would have seen the condition and corrected it.

Another witness, who resided on St. Lawrence Avenue just north of the scene of the accident, testified to the effect that it was his habit to walk in that vicinity three of four times a day; that he saw the work being done there, and that after they had broken up the curb, they put up boards around the broken portion of the pavement and curb. On cross-examination, in describing the barricade, this witness used the term "horses", which, he stated, were put up to keep people from walking upon the broken up portion of the pavement, and that these barricades were placed on the south and east of the hole, that they extended eight or nine feet on 47th Street and on St. Lawrence Avenue from the edge of the broken place to the sidewalk, and that there was plenty of room to pass in the street without running into the barricade.

The evidence here, while very confusing, seems to indicate very clearly that proper barricades had been placed around the excavation made in the street and at the point in question, and there is no evidence that they had been removed. The only fact which seems clear from all the evidence is that plaintiff suddenly found herself in this hole. There is also some evidence which seems to establish the fact that, in excavating, piles of dirt had been placed around this hole. The plaintiff testified that she had just walked through slush and dirt when she fell into the hole. The evidence also seems to clearly indicate that this hole was at the corner of the two streets, and that the portion of 47th street usually taken by

on both sides by farmers during the daylight hours and protected by signals and lanterns during the night hours; that the witness was the hours both during his day and night, and that during the entire time this work was in progress, there were barricades about it every day, and that if they had not been there, he would have seen the conditions and noticed it.

Another witness, who resided on St. Lawrence Island north of the scene of the accident, testified to the effect that in one his habit to walk in that vicinity three or four times a day; that he saw the work being done there, and that after they had broken up the road, they put up barrels around the broken portion of the pavement and work. On cross-examination, in describing the barricades, this witness used the term "barrels", which, he stated, were put up to keep people from walking down the sewer on portion of the pavement, and that these barricades were placed on the south and east of the hole, that they extended right on to mine that he first saw and on St. Lawrence Avenue from the edge of the broken place to the sidewalk, and that there was plenty of room to pass in the street without touching some the barricades.

The evidence here, while very doubtful, seems to indicate very clearly that proper barricades had been placed around the excavation made in the street and at the point in question, and there is no evidence that they had been removed. The only fact which seems clear from all the evidence is that practically nothing further happened in this hole. There is also some evidence which seems to establish the fact that, in excavating, piles of dirt had been dumped around this hole. The plaintiff testified that she had just walked through slush and fell when she fell into the hole. The evidence also seems to clearly indicate that this hole was at the corner of the two streets, and that the portion of the street usually taken by

pedestrians in coming from the south to the north side thereof, was clear.

From the entire record we arrive at the conclusion that the plaintiff has not established her case by the manifest weight of the evidence. Therefore, the cause is reversed and remanded for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

HEBEL, P.J. CONCURS,

DENIS E. SULLIVAN, J. DISSENTING:

Whether or not the city was in the exercise of ordinary care to render the street in question safe for the use of the public, after having admitted that it made it unsafe by digging a large hole in the street, was a question of fact for the jury. The evidence being conflicting, the jury was in a better position to determine wherein lay the preponderance or greater weight of the evidence, than is a court of review.

In my opinion the verdict of the jury should not be set aside.

perhaps in moving from his mouth to the ears also hearing, are clear.

From the Judge remark or entry on the questionnaire that the plaintiff has not established her case by the manifest weight of the evidence. Therefore, the court is reversed and remanded for a new trial.

EVIDENCE: IN CONSIDERING LOS A NEW TRIAL.

BANKS, P.J. DOUGLAS,

DAVID S. MILLER, J. DISSENTING:

Whether or not the city was in the exercise of reasonable care to warn the minors in question with the use of the public, after having admitted that it was it worth by digging a large hole in the street, was a question of fact for the jury. The evidence being conflicting, the jury was in a better position to determine whether the preponderance or greater weight of the evidence, that is a court of review.

In my opinion the verdict of the jury should not be set aside.

39928

FREDERICK H. SCHNELL,

Appellant,

v.

NATIONAL AIR TRANSPORT, a corporation,

Appellee.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

29A

296 I.A. 641

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against the defendant for injuries claimed to have been sustained by him while flying in defendant's aeroplane over the state of Missouri, and that the alleged injury resulted from the escape of carbon monoxide gas into the plane as a result of defendant's negligence.

It is the contention of defendant that plaintiff is barred from a recovery in this action because of the fact that he is bound by Section 29 of the Illinois Workmen's Compensation Act. Upon the hearing, the court found that both plaintiff and defendant were so bound, and directed a jury to return a verdict in favor of the defendant. The facts bearing on this question were all stipulated. The stipulation, as read to the jury, is as follows:

> "That on and before the 11th of October, 1932, the plaintiff Frederick H. Schnell, was employed as office manager by Lear Developments, Inc.; that on and immediately before said 11th day of October, 1932, William Lear, President of said Lear Developments, Inc., directed the said plaintiff, Frederick H. Schnell, to go to Kansas City, Missouri, to attend to the installation of certain radio equipment on a certain aeroplane then located at Kansas City, Missouri; that such installation and work at Kansas City, Missouri, was to be for and on behalf of said Lear Developments, Inc.; that said plaintiff, Frederick H. Schnell, chose to make the trip to Kansas City, Missouri by aeroplane, which fact was prior to the start of said trip, known to said William Lear; that at the time of the occurrences complained of in the declaration the said plaintiff, Frederick H. Schnell, was enroute to Kansas City, Missouri, to do said work for said Lear Developments, Inc.; that on said 11th day of October, 1932, the said Lear Developments, Inc., and the said plaintiff, Frederick H. Schnell, as its employee, were operating under and bound by the Workmen's Compensation Act of the State of Illinois."

The attorney for the plaintiff was then asked by the attorney for defendant, whether or not he admitted that the defendant

[illegible]

[illegible]

[illegible]

and its servants were under the Workmen's Compensation Act of the State of Illinois, and he thereupon made the following statement: "Oh yes, I have just stated that I will admit they (the defendant and its servants) were acting under the Act at the time of this occurrence." The attorney for plaintiff was then asked this question by the attorney for the defendant: "That the defendant was on the date of October 11, 1932, operating under and bound by the provisions of the Workmen's Compensation Act of the State of Illinois?" Answer: (by attorney for plaintiff) "Under the Compensation Act of Illinois."

Plaintiff contends that the court erred in its finding as a matter of law, that plaintiff and defendant were both under and subject to the provisions of Section 29 of the Workmen's Compensation Act of the state of Illinois "at the time and place of the occurrence in question", and that Section 29 of the Workmen's Compensation Act of the State of Illinois "as to the facts in this cause" had such extra-territorial effect as to be binding on the parties hereto, and a bar to plaintiff's cause of action, and that the trial court erred in its findings of law that the Workmen's Compensation Act of the State of Illinois govern the relationship between the plaintiff and defendant at the time and place of the occurrence in question. Plaintiff contends that because of the fact that the relationship between plaintiff and defendant was that of passenger and carrier engaged in interstate commerce, that the Employers Liability Act has no application, and that, therefore, he is entitled to recover whatever damages he may have suffered because of defendant's negligence.

Plaintiff testified that on October 11, 1932, he was directed by his employer to proceed to Kansas City, Missouri to do some work; that he boarded a plane at the Municipal Airport in Chicago to go to Kansas City, and that while enroute, he suffered the injury for which he claims damages.

In O'Brien v. Chicago City Ry. Co., 305 Ill. 244, the Supreme Court held that under the Employers' Liability Act, where an injury is caused by the negligence of a third party who is bound by the provisions of the act, the employee has no right of action against the third party, but that such right is transferred to the employer who paid the compensation fixed by the act. This rule has been stated so frequently that it is useless to cite further authority.

In Kennedy-Van Saun Corp. v. Industrial Commission, 355 Ill. 519, the Supreme Court held that where an accidental injury is sustained by a non-resident in the State of his domicile while employed by an Illinois corporation under a contract entered into in Illinois, such injury is within the provisions of the Illinois Compensation Act, and that this is true even though the original contract of employment was with a foreign corporation. See also Beall Bros. Supply Co. v. Industrial Commission, 341 Ill. 193.

There can be no question but that plaintiff was entitled to compensation from his employer, under the Compensation Act, and if this be true, then he has no right of action against the defendant. As already stated, the action, if compensation were paid, would be that of his employer. We are of the opinion that the trial court was not in error in directing a verdict and entering judgment for defendant. The judgment is, therefore, affirmed.

AFFIRMED.

HEBEL, P.J. AND DENIS E. SULLIVAN, J. CONCUR.

In *Irwin* v. *Ottawa City Ry. Co.*, 205 Ill. 164, the Supreme Court held that under the employers' liability act, where an injury is caused by the negligence of a fellow servant who is bound by the provisions of the act, the employee has no right of action against the entire entity, but that such right is transferred to the employer who paid the compensation fixed by the act. This rule has been strongly criticized that it is useless to elude workmen's liability.

In *Kenney-The Sun Case* v. *Industrial Commission*, 293 Ill. 210, the Supreme Court held that where an industrial injury is sustained by a non-resident in the State of his domicile while employed by an Illinois corporation under a contract entered into in Illinois, such injury is within the operation of the Illinois Compensation Act, and that this is true even though the original contract of employment was with a foreign corporation. See also *Ehell Bros. Brick Co.* v. *Industrial Commission*, 281 Ill. 183.

There was no question but that liability was restricted to compensation from his employer, under the Compensation Act, and if this be true, then he has no right of action against the defendant. As already stated, the action, if compensation were paid, would be that of his employer. In the of the opinion that the trial court was not in error in directing a verdict and entering judgment for defendant. The judgment is, therefore, affirmed.

Affirmed.

McBRIDE, P.J., and DIRK J. MCGLYNN, J. concur.

39989

KEYSTONE GARMENT CO., a corporation,
Appellant,
v.
THE NORTHERN TRUST COMPANY, a banking corporation and JULIA GOTTMAN, Intervener,
Appellees.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

30A

296 I.A. 642

MR. JUSTICE DENIS E. SULLIVAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, Keystone Garment Co., brings this appeal from a judgment entered on the verdict of a jury in the Municipal Court for the sum of $1,389.47, in favor of Julia Gottman, intervener, and against said plaintiff and the defendant Northern Trust Co.

The action arose out of the alleged wrongful withholding of funds claimed by the plaintiff and then on deposit with the Northern Trust Co. bank in the amount of $1,389.47. The intervener, Mrs. Julia Gottman, filed her petition with leave of court also claiming the said sum so held by the Northern Trust Co. bank.

It appears from the pleadings and the evidence that the intervener, Julia Gottman, lives at Evansville, Indiana and that she is a widow; that after the death of her husband, through circulars sent to her, she came in contact with a man named J. W. Primakow, who said he represented Robert J. Standish & Co.; that he told her Standish was a multi-millionaire dealing in stocks, bonds and investments; that in a short time he induced her to send a draft drawn by the Citizen's Trust & Savings Bank of Evansville, Indiana, on the Northern Trust Company of Chicago for $1,600.00, payable to Mrs. Chas. Gottman for the purpose of buying some Packard Motor stock. After receiving the check it appears that J. W. Primakow, claiming to be Robert J. Standish, induced Mrs. Gottman to affix on the back of said check an endorsement by her to Robert J. Standish Company, Chicago, Illinois.

It further appears that the names Robert J. Standish and Robert J. Standish Company were merely fictitious and both were non-existent; that she never received the amount of said check nor the Packard Motor stock, nor any part of the value thereof, by reason of the misrepresentations and fraud that had been perpetrated against her and when she learned of this she served notice and made a demand upon the Northern Trust Company, as drawee of said draft or check in the amount of $1,600.00 in order to stop payment of said draft.

It further appears that the Northern Trust Company stated that it credited the amount of the check to the account of Keystone Garment Company, one of its depositors, but later informed Mrs. Gottman that when they learned the facts, they withdrew the credit they had given the Keystone Garment Company and placed an order to hold the balance in the account of the said Keystone Garment Co., namely, $1,389.47.

The rest of the facts as disclosed by the evidence clearly show this to be a case of deceit, fraud and conspiracy perpetrated against the said Julia Gottman by experts in the business of swindling. This does not include defendant, Northern Trust Company.

It seems that a further part of the deal between Mrs. Gottman and the fraudulent Robert J. Standish Company, was that she was to forward to said company in addition to the money, some bonds which she held in another company known as Menion & Hubbel; that at the request of said Primakow, Mrs. Gottman mailed the said bonds to Robert J. Standish, 100 North LaSalle Street, suite 712, Chicago, Illinois, and also mailed the draft for $1,600.00.

Thereafter, growing suspicious that she had been defrauded, Mrs. Gottman came to Chicago in an endeavor to find Standish, or Standish & Company, but when she found an office with his name on the door, she was unable to find anyone who could identify him, including a girl in charge of said office; that she went to the States

It further appears that the young lawyer J. Crawford and Robert L. Sheridan Company were wholly fictitious and both were mere aliases; that the notes received the amount of said bonds and the proceed solely stolen, not any part of the million received, as shown at the disappearance-time the issue was not yet authorized without but and when the issuance of this the jurgent notice not yet a bonded upon the Northern Trust Company, in excess of said legal or bonds in the amount of $1,000,000 in order to cover payment of said drafts.

It further appears that the Northern Trust Company stated that it received the amount of the bonds in the amount of Lyndon Company Company, one of its depositors, but later informed Mr. Bottman that even they instead the first, they claiming the proceeds they had given the Lyndon Forward Company not signed on order to hold the notes in the amount of the said Lyndon Company Company, $1,000,000.

The fact of the fraud is disclosed by the evidence showing this to be a case of double, fraud and conspiracy perpetrated against the will Lyndon by forgery in the business of principal. This does not include interest, Northern Trust Company.

It seems that a further part of the foul matter the Bottom and the defendant Robert J. Sheridan Company, and that the is forced to full company in addition to Mr. Sheridan, some people who had held in another company value to Bottom & Company; that at the amount of said fraudulent, Bottom called the said bonds to Tenney J. Brandon, Mr. Harry Lyndon Jones, Chicago Title and Trust Company, Chicago, Illinois, and then called the first the $1,000,000.

Therefore, proving conclusive that was not from Sheridan, Mr. Bottom come to Chicago in an endeavor to find Sheridan, or Sheridan & Company, but when she found no office was gone on the door, she was unable to find anyone who could identify him, locating a jail in charge of jail office; that she went to the Tenney

Attorney's office and an assistant was detailed to help her locate said Robert J. Standish and in August she called on a Mr. Mitchell, a lawyer who had an office in the same building and on the same floor as the office where the door was marked, "Standish & Company"; that she and the assistant from the States Attorney's Office went in to see said Mr. Mitchell and he suggested that they call on a Mr. Abe Aberman, another attorney, the brother of the president of plaintiff company, who had an office near there.

It further appears that Mrs. Gottman accompanied by the police officer from the States Attorney's Office, went to the Northern Trust Company to find out where the Keystone Garment Co. was located and how their name came to appear as an endorser on the check.

The check which is marked "Gottman Exhibit 2", reads as follows:

"CITIZENS TRUST & SAVINGS BANK
Evansville, Ind. Aug. 1, 1933 No. 5710
Pay to the order of Mrs. Chas. Gottman $1600.00

Insured $1600.00 cts. Dollars

O. W. Bernhardt
V.P.

The Northern Trust Co.,
Chicago, Ill."

The reverse side of the check bears the following endorsements:

"Pay to the Order of
Robert J. Standish Co.
Chicago, Ill.
Mrs. Chas Gottman
Robert J. Standish Co.
Robert J. Standish
Keystone Garment Co.
H. S. Aberman, Pres."

It further appears that when Mrs. Gottman called on Harry S. Aberman, who was then president of the Keystone Garment Co., and a brother of Aberman the lawyer, endeavoring to find out how the check came into their possession, Aberman told her that he got the check from this brother who was an attorney located at 11 South LaSalle Street. Harry S. Aberman further stated that his brother came to

Attorney's office and an analytical one leading to this far lands said notary J. Crossley and in signed the action on a to. Gradual, a lawyer who had to office in the same building and in the same floor as the office where the door was locked. "Should I Commoy", that she and the assistant then the notary Crossley's office and in so see said Mr. Gradual and be successful work they will on a Mr. Ade therefore, another attorney, the owners of the resident of Gradual company, who had an office next "door".

At further inquire that Mrs. Bottom communicating by the police without from the Grade Crossley's office, read to the Bottom trust Company to find out where the Grandson occupied in, was learned and how their name came to be attached on the board.

The board being is marked "Bottom Builds Bl", which is follows:

"Citizens Trust & Bottom Co
Evansville, Ind. Inc. 1, 1907 Co. Ltd
Fix to the money of Mr. Jos. Bottom Co.Co.

Phone 1200.00 Cos. Malone

T. J. Woodward
T.T.

The Bottom Trust Co.,
Chicago, Ill."

The picture also of Mr. Bottom shows the following malade-mark:

"Key to the Combs of
Robert J. Bottom Co.
Chicago, Ill.
Mr. John Bottom
Robert J. Bottom Co.
Robert J. Bottom
Keystone Lumber Co.
O. K. Cheney, Jr."

At further inquire this road Mrs. Bottom called on Mr. J. Brown, who was then President of the Keystone Lumber Co., and a brother of Jonathan the lawyer, endeavoring to find out how the board came into their possession. Brown said he was to get the board from this station who was on Attorney Lawrence of Il South Lafayette Street. Going J. Bottom further stated that his mother was to

him and asked him to cash the check as he did not have enough money in the bank to cover the amount of the check and that he cashed it for his said brother; that this brother told him he had received the check from one of his clients; that he stated he did not know who Standish was and that they would have to see his brother.

It further appears that Mrs. Gottman and the police officer from the states attorney's office then went to the office of Abe Aberman at 11 South LaSalle Street and that Aberman told them that he got the check from a client named Sam La Bow who had owed him $125 for sometime. Said Aberman stated that LaBow was a business man on the south side and was in the drug business. It developed that LaBow was out of town for about ten days and during that time he was "picked up" by the Government officers for law violations.

It further appears that the man by the name of LaBow, from whom Aberman obtained the check in question, was an associate of the man called Standish; that LaBow claimed to have a restaurant at 184 North Clark street, with a place in the back of said premises which he had rented to a "bookie" where one could bet on horse races and that "Bob" Standish used to come into the restaurant and that Standish owed LaBow some money; that LaBow was a client of the attorney Aberman and that LaBow did not know much about Standish. When testifying LaBow could not tell the name of the man to whom he had rented the back portion of his restaurant to operate a place to take bets on horses and did not know how long he had known him.

It further appears that the lawyer Aberman did not endorse the check to his brother, although he claimed he had an interest in it, having obtained the said check from LaBow, his client, because of money that was owing to said Aberman from said LaBow.

It further appears by stipulation that Primakow, alias Robert J. Standish, alias Irving Stein, and others were indicted and

him and asked him to come out where he could not have enough money in the bank to cover the amount of the check and that he wanted it for his sick brother; that this brother had his he had received the check from one of his relatives; that he wished he did not know the checks was not good but only went home to see his brother.

It further appears that Mrs. Watkins and the police officer from the state attorney's office then went to the office of Mr. Abernon of 11 North Lamar Street and that Abernon told them that he got the check from a client named Jon Le Roy who had come him like for memorizing. This Abernon stated that Lamar was a business man in the north city and was in the drug business. It appeared that Lamar was out of town but about ten days and getting that time by the "picked up" by the government officers for his violations.

It further appears that the man by the name of Lamar, from whom Abernon obtained the check in question, was an associate of the man called Shorty; that Lamar claimed to have a restaurant in the North Side street, with a place in the back of said restaurant which he had rented to a "Negro" there and could not be better known as that "Shorty" Abernon used to come into the restaurant and that Lamarck owed Lamar some money; that Lamar was a client of the attorney Abernon and that Lamar did not know much about Shorty. When investigating Lamar could not find the name of the man he claim he owed the back portion of his restaurant he undertook a place to take this in Savana and did not have her name for her name.

It further appears that the lawyer Abernon did not endorse the check to the bearer, although he claimed he had so indorsed it, having obtained the said check from Lamar, his client, because of money that was owing to said Abernon from said Lamar.

It further appears by stipulation that Patterson, alias Robert L. Brazelle, alias Leroy Shorty, was already indicted for

convicted in the Criminal Court and sentenced to the penitentiary for having perpetrated this fraud.

One could not read this evidence without being impressed with the fact that the jury was thoroughly justified in disbelieving, as they evidently did, any of the apparent fictitious stories which were told by LaBow, the Abermans or Primakow.

Many points of law are raised and argued by the defendant which are not applicable to the facts as herein set forth.

The facts presented to us for consideration disclose a concerted plan to defraud the intervener Julia Gottman of the proceeds from the check in question through the cooperation of some of the witnesses for the Keystone Garment Co.

Complaint is made to some of the rulings by the court on the admission of evidence, but as no motions were made to strike the same at that time, we cannot now entertain such objections for the first time.

The Northern Trust Company does not appeal from the judgment rendered against it.

There may have been a few rulings by the court which occurred in the haste of the trial, which upon reflection might be changed, but such rulings were inconsequential and did no harm and, as before stated, since no motions were made as to a major part of said rulings at the time of the trial in order to give the trial court an opportunity to correct such errors, if any there were, we cannot consider such rulings at this time.

We think the weight of the evidence was clearly in favor of the intervener and that the jury could not consistently have arrived at any other verdict than the one they did; that the motion for a new trial was properly overruled; that the motion to enter a judgment non obstanti veredicto was properly denied and the court

equivalent in the Criminal Court had mentioned to you concerning for having murdered this Frank.

You could not have this evidence without being impressed with the fact that you just now accordingly qualified in disclaiming, as they evidently did, any of the important floridities charges which were told by Bohm, the Chemist de Trabber.

Many minutes of law may related and argued by the defendant which are not applicable to the facts as jurors and facts.

The facts presented to us for consideration disclose a concerted plan to defraud the insurance. This motive of the prosecution from the above is quelling through the concentration of some of the witnesses for the defense towards us.

Therefore it must be seen of the jurors by the court as the admission of evidence, but as we motions more main to defraud the case of this film, we cannot see material such objections for the first time.

The Southern Court Decision also not issued from the judgment rendered quality it.

There may also have been a few minutes by the court which occurred in the hours of the trial, which upon reflection cause to consider, but such motions were inconsequential and in no case not, as before stated, place no motions were made of to a judge with of this minutes of the time. If the Court is right in give the trial court in wrongfully to material such errors, if any there were, we cannot sanction such minutes as this case.

We think the weight of the evidence was clearly in favor of the intervenor and that the jury would not reasonably have arrived at any other verdict than the one they did; that the motion for a new trial was properly overruled; that the motion to take a judgment non obstante verdicto was correctly denied and the order

was correct in entering the judgment that it did.

Therefore, the judgment of the Municipal Court awarding Julia Gottman damages in the sum of $1,389.47, is affirmed at plaintiff's costs.

JUDGMENT AFFIRMED.

HEBEL, P.J. AND HALL, J. CONCUR.

one quarter is entering the judgment here it did.

Therefore, the judgment of the municipal court awarding this veteran freedom in the sum of $3,000.47, is affirmed at plaintiff's costs.

JUDGMENT AFFIRMED.

WEBER, P.J. AND WIDE, J. CONCUR.

40042

C. V. GAWNE, also known as
CLARA V. GAWNE,
Appellant,

vs.

H. A. GUNDLING,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

B/A

296 I.A. 642

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from an adverse judgment in an action brought by her to recover rent on a written lease.

Defendant signed a lease of an apartment in Chicago for a period commencing October 1, 1931, and terminating September 30, 1932. March 7, 1936, plaintiff had a judgment entered by confession against defendant for $1145. January 19, 1937, on motion of defendant the judgment by confession was vacated and he was permitted to defend. The case was subsequently tried before the court and September 30, 1937, judgment was entered in favor of defendant, and plaintiff appeals from that judgment.

The record is very confusing. To narrate all the steps would be useless. Defendant attacks vigorously the statement of facts, which is in a very unsatisfactory form. However, instead of sending the case back for another trial we have deduced from the record what seems to us to be the proper conclusion.

The crucial question is as to the amount defendant owes. The lease calls for a rental of $100 a month, but defendant says that in May, 1932, this was reduced to $75 a month for the remainder of the term. Defendant made certain payments during the period of the lease which plaintiff claims to have applied on a prior indebtedness. Defendant asserts there was no prior indebtedness and that these payments were made on account of the lease in question. These payments were made by checks, which were introduced in evidence,

G. V. DAVIS, also known as
CLARA V. DAVIS,
Appellant,

vs.

H. A. GORDIAN,
Appellee.

IN WISCONSIN JUSTICE COURT
DELIVERED THE TERMINE OF THE COURT.

Plaintiff appeals from an adverse judgment in an action brought by her to recover rent on a written lease.

Defendant signed a lease of a apartment in Chicago for a period commencing October 1, 1931, and terminating September 30, 1932. Before 7, 1932, plaintiff had a judgment entered by confession against defendant for $[illegible]. Judgment 19, 1937, on motion of defendant the judgment by confession was vacated and he was permitted to defend. The case was subsequently tried before the court and September 30, 1937, judgment was entered in favor of defendant, and plaintiff appeals from that judgment.

The record is very confusing. It matters all the steps would be needless. Defendant attacks vigorously the statement of facts, which is in a very unsatisfactory form. However, instead of sending the case back for another trial we have deduced from the record what seems to be to be the proper conclusion.

The crucial question is as to the amount defendant owes. The lease calls for a rental of $100 a month, but testimony says that in May, 1931, this was reduced to $75 a month for the remainder of the term. Defendant made certain payments during the period of the lease which plaintiff claims to have applied on a prior indebtedness. Defendant asserts there was no prior indebtedness and that these payments were made on account of the lease in question. These payments were made by checks, which were introduced in evidence,

but they are not in the record before us. We shall therefore accept defendant's statement that they were tendered and received as payments to be applied on the rental in the instant lease.

These payments amounted to $550, and this amount is not in dispute. Debiting defendant with rent for January, February, March, April and May at $100 a month, and for the remainder of the term at $75 a month, makes a charge against defendant of $800; applying $550 paid by him on this, leaves a balance due by him of $250.

The judgment is therefore reversed and judgment against defendant entered in this court for $250.

REVERSED AND JUDGMENT AGAINST
DEFENDANT ENTERED IN THIS COURT.

Matchett and O'Connor, JJ., concur.

but they are not in the record before us. We must therefore accept defendant's statement that they were returned and received as payments to be applied on the rentals in the instant cause.

These payments amounted to $850, and this amount is not in dispute. Deducting defendant's rent for January, February, March, April and May at $100 a month, and for the remainder of the term at $75 a month, makes a credit against defendant of $800; applying $850 paid by him on this, leaves a balance due by him of $50.

The judgment is therefore reversed and judgment against defendant entered in this court for $850.

REVERSED AND JUDGMENT ROLLET
DEFENDANT ENTERED IN THIS COURT.

Hatchett and O'Connor, JJ., concur.

40067

HODGSON FOUNDRY CO., a Corporation,
Appellee,

vs.

AUTO RADIATOR MFG. CO., a Corporation,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

32 A

296 I.A. 642

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit alleging defendant had breached its contract to take a number of brass castings manufactured at its request by plaintiff. Upon trial by the court without a jury plaintiff had judgment for $1204.50, from which defendant appeals.

Although defendant's counsel presents many points, the decision rests primarily upon the facts. Defendant ordered plaintiff to manufacture for it 150,000 brass castings and after a number of these were delivered to defendant it undertook to cancel the order. Plaintiff's suit was for damages for failure to take the balance of the order which it had manufactured. The trial court was of the opinion that defendant was not justified in cancelling the order, and this is the question presented to us.

Defendant manufactures automobile radiators and heaters. March 2, 1934, it wrote requesting plaintiff to furnish 150,000 brass castings for such heaters, to be delivered 50,000 August 1st, 50,000 September 1st, 50,000 October 1st, "or sooner if wanted." In order to have the castings ready when defendant might order them plaintiff proceeded to manufacture all of them. Deliveries were made in May, June, July, August and September, 1934. These deliveries aggregated 61,698, and were paid for. September 24, 1934, defendant wrote plaintiff asking it to discontinue making castings, as it had experienced trouble with the quality of the castings delivered and that it had become necessary for defendant to purchase these castings elsewhere.

40067

RODGERS FOUNDRY CO., a corporation,
Appellee,

vs.

AUTO RADIATOR MFG. CO., a corporation,
Appellant.

APPEAL FROM MARICOPA
COUNTY OF ORIGINAL.

295 I.A. 642

MR. PRESIDING JUSTICE McDONALD
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit alleging defendant had breached its contract to take a number of brass castings manufactured at its request by plaintiff. Upon trial by the court without a jury plaintiff had judgment for $1,[illegible], from which defendant appeals.

Although defendant's counsel argues many points, the decision rests primarily upon the facts. Defendant ordered plaintiff to manufacture for it 15,000 brass castings and after a number of these were delivered to defendant it undertook to cancel the order. Plaintiff's suit was for damages for failure to take the balance of the order which it had manufactured. The trial court was of the opinion that defendant was not justified in cancelling the order, and this is the question presented to us.

Defendant manufactures automobile radiators and heaters. March 2, 1924, it wrote requesting plaintiff to furnish 15,000 brass castings for such heaters, to be delivered 5,000 August 1st, 50,000 September 1st, 50,000 October 1st, "or sooner if wanted." In order to have the castings ready when defendant might order them plaintiff proceeded to manufacture all of them. Deliveries were made in May, June, July, August and September, 1924. These deliveries aggregated 15,000, and were paid for. September 24, 1924, defendant wrote plaintiff asking it to discontinue making castings, as it had experienced trouble with the quality of the castings delivered and that it was because necessary for defendant to purchase these castings elsewhere.

Mr. Hodgson, treasurer of plaintiff, testified that in the early part of July, 1934, complaint was made to him that the castings bent, but witness showed defendant that the castings were not defective but bent because of the improper manner in which they were used; that he showed defendant how to use the castings properly; that defendant discharged the workman who had misused the castings, and that subsequent deliveries of castings were made and were paid for without further complaint.

Although there is sharp conflict in the testimony, the court could properly believe that the reason defendant had cancelled the contract was that it had found a new gadget to put into its heaters which would cost considerably less than the castings ordered from plaintiff, and that defendant could save "a lot of money" by using this new gadget.

The trial court, who saw and heard the witnesses, was better able than are we to pass upon their credibility. Its conclusion that defendant was not justified in cancelling the contract was well within the range of the testimony, and we cannot hold to the contrary.

Defendant complains of the amount of the judgment. When plaintiff received the letter of cancellation it had on hand 88,302 undelivered castings. Demand was made on defendant to pay for these, which was refused. Plaintiff thereupon remelted the castings and gave defendant credit for the value of the metal. The trial court gave plaintiff judgment for the difference between the contract price of the castings and their value melted. This was proper.

Many other points are made which do not affect the merits of the controversy. As we have said, the fundamental question was one of fact, and we see no reason to disagree with the trial court's conclusion in this respect.

The judgment is affirmed.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

Mr. Hodges, treasurer of plaintiff, testified that in the early part of July, 1924, complaint was made to him that the coatings bad, but witness stated informant that the coatings were not defective but had become of the improper manner in which they were used; that in stated informant was to let the coatings properly; that defendant discharged the workmen who had cleaned the coatings, and that subsequent deliveries of coatings were made and were paid for without further complaint.

Although there is some conflict in the testimony, the court could properly believe that the reason defendant had cancelled the contract was that it had found a new product to put like the coatings which would cost considerably less than the coatings purchased from plaintiff, and that defendant could save "a lot of money" by using this new product.

The trial court, who saw and heard the witnesses, was better able than we to pass upon their credibility. Its conclusion that defendant was not justified in cancelling the contract was well within the range of the testimony, and we cannot hold to the contrary.

Defendant complains of the amount of the judgment. When plaintiff received the letter of cancellation it had on hand 20,000 undelivered coatings. Instead of the task of informant, to pay for these, which was refused. Plaintiff therefore received its coatings and gave defendant credit for the value of the same. The trial court gave plaintiff judgment for the difference between the contract price of the coatings and their value unfilled. This was proper.

Many other points are made which do not affect the merits of the controversy. As we have said, the fundamental question was one of fact, and we see no reason to disagree with the trial court's conclusion in this respect.

The judgment is affirmed.

AFFIRMED.

Latchaw and O'Connor, JJ., concur.

40079

MAE MAYER,
Appellee,

vs.

ARTHUR S. WICKERSHAM et al.,
Appellants.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

3B4

296 I.A. 642

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

This is an appeal by two defendants from a decree entered in a foreclosure proceeding. Arthur Wickersham appeals, claiming that a necessary party was omitted from plaintiff's complaint, and that as only he and his wife signed an extension agreement it is not effective and no relief can be had against him in equity. The other appellant, Charles P. R. Macauley, objects to the decree giving plaintiff a coordinate lien with him.

The complaint was in the ordinary form, alleging that on May 6, 1910, Enoch Wickersham executed his note for $3000, due May 6, 1915, with interest payable semi-annually; that this was secured by a trust deed executed by Enoch and Emma Wickersham, his wife, conveying real estate in Cook county. When the note fell due the time of payment was extended to May 6, 1920, and again on that date by another extension signed by Enoch Wickersham and his wife the payment of the note was further extended to May 6, 1925. On this last date payment was extended for three years by a writing signed by Arthur S. Wickersham and Frances M. Wickersham, his wife, who are described as the makers of the note and owners of the premises described in the trust deed. Two subsequent extension agreements were executed by the same parties, in which they were described as owners of the premises conveyed by the trust deed. The complaint alleged that when the principal note came due May 10, 1936, it was not paid, and that there was default in the payment of taxes for a number of years.

The complaint made parties defendant Arthur S. Wickersham,

4007?

MAE MAYER,
Appellee,

vs.

ARTHUR S. WICKERSHAM et al.,
Appellants.

APPEAL FROM CHICAGO COURT
OF COOK COUNTY.

296 I.A. 642

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

This is an appeal by two defendants from a decree entered in a foreclosure proceeding. Arthur Wickersham appeals, claiming that a necessary party was omitted from plaintiff's complaint, and that as only he and his wife signed an extension agreement it is not effective and no relief can be had against him in equity. The other appellant, Charles E. A. Wachsley, objects to the decree giving plaintiff a court judgment against him.

The complaint was in the ordinary form, alleging that on May 6, 1910, Joseph Wickersham executed his note for $3000, due May 6, 1915, with interest payable semi-annually; that this was secured by a trust deed executed by Joseph and Sara Wickersham, his wife, conveying real estate in Cook county. When the note fell due the time of payment was extended to May 6, 1920, and again on that date by another extension signed by Joseph Wickersham and his wife the payment of the note was further extended to May 6, 1926. On this last date payment was extended for three years by a writing signed by Arthur S. Wickersham and Frances S. Wickersham, his wife, who are described in the writing as the maker of the note and owners of the premises described in the trust deed. The subsequent extension agreements were executed by the same parties, in which they were described as owners of the premises conveyed by the trust deed. The complaint alleged that when the principal note came due May 10, 1926, it was not paid, and that there was default in the payment of taxes for a number of years.

The complaint made parties defendant Arthur S. Wickersham,

Frances M. Wickersham, his wife, Emma L. Wickersham, Charles P. R. Macaulay, also certain others and unknown owners.

Enoch F. Wickersham, the maker of the original note and also a grantor in the trust deed, was not named in the complaint nor made a party, and there is no allegation as to how Arthur Wickersham became the owner of the premises.

Summons was issued for all the named parties, which was returned not found as to Arthur S. Wickersham; service was had on the defendants not found by publication and mailing, and they were defaulted for failure to appear.

The case was referred to a master who took evidence. Nowhere in the evidence is there any testimony as to whether Enoch Wickersham was still living or how Arthur S. Wickersham became owner of the premises. In a number of letters introduced Arthur Wickersham is referred to as the owner of the premises and as obligated to pay the indebtedness secured by the trust deed.

The master filed his report recommending that a decree be entered in accordance with the prayer of the complaint; objections were filed and overruled, and were filed as exceptions before the chancellor, who also overruled them and entered a decree as recommended.

Although Arthur S. Wickersham did not appear before the master or before the chancellor and was defaulted, he filed his notice of appeal. Wickersham first says in this court that the agreements to extend the note were not signed by the holder of the note and therefore were of no effect, and that he, defendant, can not be sued in equity but only in law on the contract of extension. The suit is to foreclose a lien of the trust deed on real estate and is an action <u>in rem</u>. There is no deficiency judgment against him and there could not be. Apparently Arthur Wickersham claimed to own the property and was a proper party to the foreclosure pro-

Frances E. Wickersham, his wife, Emma J. Wickersham, Charles F. E. Lacomley, also certain others and unknown owners.

Enoch L. Wickersham, the father of the first named and also a creditor in the trust deed, was not named in the complaint nor made a party, and there is no allegation as to how Arthur Wickersham became the owner of the premises.

Summons was issued for all the named parties, which was returned not found as to Arthur C. Wickersham; service was had on the defendants now found by publication and mailing, and they were defaulted for failure to appear.

The case was referred to a master who took evidence, somewhere in the evidence is there any testimony as to whether Enoch Wickersham was still living or how Arthur C. Wickersham became owner of the premises. In a number of letters introduced Arthur Wickersham is referred to as the owner of the premises and as obligated to pay the indebtedness secured by the trust deed.

The master filed his report recommending that a decree be entered in accordance with the prayer of the complaint; objections were filed and overruled, and were filed as exceptions before the chancellor, who also overruled them and entered a decree as recommended.

Although Arthur C. Wickersham did not appear before the master or before the chancellor and was defaulted, he filed his notice of appeal. Wickersham first says in his brief that the agreements to extend the note were not signed by the maker of the note and therefore were of no effect, and that Mr. Wickersham, can not be sued in equity but only in law on the contract of extension. The suit in to foreclose a lien of the trust deed on real estate and is an action in rem. There is no deficiency judgment against him and there could not be. Apparently Arthur Wickersham claimed to own the property and was a proper party to the foreclosure pro-

ceeding, and so long as there is no personal judgment against him he cannot complain.

The note and trust deed were not barred by the statute of limitations. The record shows that interest notes were given with the extension agreements and were thereafter paid.

Defendant Wickersham also asserts that plaintiff cannot maintain her complaint because the original mortgagor, Enoch F. Wickersham, and the original trustee, Peter Phillip, were not made parties. Harry D. Irwin, who was named as successor trustee in event of inability of Phillip to act, was named as a party defendant. In the brief for plaintiff it is stated that Peter Phillip, the original trustee, is dead. This fact should have been alleged and proven.

Arthur Wickersham is not affected by the failure of plaintiff to allege or explain by testimony why Enoch Wickersham and Peter Phillip were not made parties defendant. This failure does not affect in any way defendant's rights and the decree should not be reversed simply to make a better title for the plaintiff. In Press v. Woodley, 160 Ill., 433, 437, it is said that a party can not assign for error that which does not affect him but is prejudicial only to others who do not complain, citing many cases.

Counsel for plaintiff should have alleged or shown by testimony why Enoch Wickersham and Peter Phillip were not made parties defendant, and so averted trouble.

Defendant Macaulay was decreed a lien on the premises to the amount of $477.10, coordinate with the lien of the plaintiff of $3504.75. Macaulay claims a first lien for the amount found due him. The record shows that when the principal sum of $3000 fell due by extension on May 10, 1933, the further extension agreement then executed by Arther S. Wickersham and his wife provided that the principal sum of $250 should be payable May 10, 1935, and the balance of $2750 payable May 10, 1936. Macaulay claims that when the $250 note fell due May 10, 1935, it, with the interest coupon, was as-

ceeding, and so long as there is no personal judgment against him he cannot complain.

The note and trust deed were not barred by the statute of limitations. The record shows that interest notes were given with the extension agreements and were duly paid.

Defendant Vickerman also asserts that plaintiff cannot maintain her complaint because the original mortgagor, Anna L. Vickerman, and the original trustee, Peter Phillip, were not made parties. Harry D. Irwin, who was named as successor trustee in event of inability of Phillip to act, was named as a party defendant. In the brief for plaintiff it is stated that Peter Phillip, the original trustee, is dead. This fact should have been alleged and proven.

Arthur Vickerman is not affected by the failure of plaintiff to allege or explain by testimony why Anna Vickerman and Peter Phillip were not made parties defendant. This failure does not affect in any way defendant's rights and the decree should not be reversed simply to make a better title for the plaintiff. In Press v. Conlisk, 150 Ill., 483, 487, it is said that a party can not assign for error that which does not affect him but is jurisdictional only to others who do not complain, citing many cases.

Counsel for plaintiff should have alleged or shown by testimony why Anna Vickerman and Peter Phillip were not made parties defendant, and so avoided trouble.

Defendant Kozmsky was decreed a lien on the premises to the amount of $477.10, coordinate with the lien of the plaintiff of $8324.70. Kozmsky claims a first lien for the amount found due him. The record shows that such the principal sum of $500 was due by extension on May 10, 1927, the further extension agreement then executed by Arthur A. Vickerman and his wife providing that the principal sum of $500 should be payable May 10, 1928, and the balance of $2700 payable May 10, 1930. Kozmsky claims that when the $500 note fell due May 10, 1928, it, with the interest coupon, was ex-

signed to him in consideration of his advancing to the owner the amounts then due. Macaulay says he is entitled to a first lien as the $250 note matured before the balance of the indebtedness and hence it must be presumed that the parties intended that the liens of the several notes should be determined by the times of maturity.

The evidence failed to prove an assignment of the note, with coupons, to Macaulay. The then owner of the note, John A. Schiesswohl, received a letter from Macaulay dated May 3, 1935, stating he was advancing the money for his client, Wickersham, to pay the amount due, and that Wickersham had agreed to reimburse him within 90 days. A second letter was sent by Macaulay stating that Wickersham had not yet repaid him the amount advanced and that he had decided to give him further time to pay this. There is no evidence that the owner agreed to any assignment. In fact there is no evidence that he answered Macaulay's letters, but accepted the payments in accordance with the terms of the extension agreement. Macaulay was Wickersham's attorney at the time and, as stated in his letter, he looked to Wickersham to repay him money advanced by him. No action was taken by Macaulay to assert any rights in connection with these advancements until he filed his answer in the present suit.

The trust deed was given for the security of the principal note of $3000, with interest, and there is no provision therein for priority.

We find no merit in the points raised by either of the appealing defendants. There is no convincing defense to the right of plaintiff to foreclose the lien of the trust deed, and the amount found due is not questioned.

We find no sufficient reason to reverse the decree, and it is affirmed.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

signed to him in consideration of his advancing to the owner the amounts then due. Kennedy says he is entitled to a first lien on the $250 note matured before the balance of the indebtedness and hence it must be presumed that the parties intended that the liens of the several notes should be determined by the times of maturity.

The evidence failed to prove an assignment of the note, with coupons, to Kennedy. The then owner of the note, John A. Cochieswohl, received a letter from Kennedy dated May 6, 1925, stating he was advancing the money for his client, Wickersham, to pay the amount due, and that Wickersham had agreed to reimburse him within 90 days. A second letter was sent by Kennedy stating that Wickersham had not yet repaid him the amount advanced and that he had decided to give him further time to pay him. There is no evidence that the owner agreed to any arrangement. In fact there is no evidence that he answered Kennedy's letters, but accepted the payments in accordance with the terms of the extension agreement. Kennedy was Wickersham's attorney at the time and, as noted in his letter, he loaned to Wickersham to repay him money advanced by him. No action was taken by Kennedy to assert any rights in connection with these advancements until he filed his answer in the present suit.

The first lien was given for the security of the principal note of $500, with interest, and there is no provision therein for priority.

We find no merit in the points raised by either of the appealing defendants. There is no controlling difference in the right of plaintiff to foreclose the lien of the trust deed, and the amount found due is not questioned.

We find no sufficient reason to reverse the decree, and it is affirmed.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

40091

JOSEPH YAGODNIK,
Appellant,

vs.

H. BUCHMAN,
Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

B+A

296 I.A. 643

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from orders of court striking his statement and amended statement of claim.

Plaintiff's amended statement alleged that he manufactures men's pants; that he has always borne a good reputation in that business and is experienced and familiar with the details of the business; that in June, 1937, defendant agreed to pay plaintiff $5 for two pairs of pants, to be made from material furnished by defendant; that plaintiff did the work to the best of his experience and ability; that it was necessary to press the pants in order to complete the work; that it has been the rule and custom in the trade for any person submitting the material to inform the tailor whether the goods are unshrunk or preshrunk; that it was the duty of defendant to inform plaintiff whether the material was preshrunk or unshrunk.

Plaintiff alleged that because of the neglect of defendant to inform plaintiff that the material furnished by him was unshrunk, plaintiff, by steam pressing, without his fault, caused the pants to shrink; that because of this plaintiff has suffered damages to his business and his reputation in the amount of $1000.

This is a novel claim. There is no allegation that plaintiff inquired about the material or that defendant knew whether it was preshrunk or not, or was aware of any custom in this respect. If, as alleged, steam pressing caused defendant's pants to shrink,

40091

JOSEPH YAGODNIK,
Appellant,

vs.

H. HUDNUT,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

296 I.A. 643

MR. PRESIDING JUSTICE WOLFRIDGE
DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from orders of court striking his statement and amended statement of claim.

Plaintiff's revised statement alleged that he manufactures men's pants; that he has always borne a good reputation in that business and is experienced and familiar with the details of the business; that in June, 1927, defendant agreed to pay plaintiff $8 for two pairs of pants, to be made from material furnished by defendant; that plaintiff did the work to the best of his experience and ability; that it was necessary to press the pants in order to complete the work; that it has been the rule and custom in the trade for any person furnishing the material to inform the tailor whether the goods are washable or preshrunk; that it was the duty of defendant to inform plaintiff whether the material was preshrunk or unshrunk.

Plaintiff alleged that despite of the request of defendant to inform plaintiff that the material furnished by him was unshrunk, plaintiff, by press pressing, without skill, caused the pants to shrink; that because of this plaintiff was entitled damages to his business and his reputation in the amount of $1000.

This is a novel claim. There is no allegation that plaintiff inquired about the material or that defendant knew whether it was preshrunk or not, or the rule or any custom in this respect. If, as alleged, close pressing caused defendant's pants to shrink,

it would seem that defendant alone suffered damages.

Plaintiff does not in this court present any convincing argument to show that the statement was improperly stricken. His brief is taken up mostly with a discussion of the Practice act and the rules of the Municipal court.

We see no reason to disagree with the ruling of the trial court and its orders striking the statement and amended statement of claim are affirmed.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

it would seem that damages were waived herein.

Plaintiff does not in this court present any argument to show that the statement has inherently evidence. His brief is taken up mostly with a discussion of the criminal act and the rules of the municipal court.

We see no reason to disagree with the ruling of the trial court and its orders striking the statement and sustained statement of claim are affirmed.

AFFIRMED.

Hatchett and O'Connor, JJ., concur.

39062

THE NATIONAL REPUBLIC COMPANY,
Appellant,

v.

W. A. WIEBOLDT et al.,
Appellees.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

296 I.A. 643

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In an action upon a promissory note for the sum of $1,000,000, dated July 10, 1930, to the order of the National Bank of the Republic, endorsed to the Chicago Trust Company without recourse, and by Chicago Trust Company likewise without recourse to plaintiff, and upon trial by jury there was a verdict for defendants on which the court, overruling motions for a new trial and for judgment non obstante veredicto, entered judgment from which plaintiff has appealed.

It is argued for reversal that motions at the close of all the evidence for an instructed verdict for plaintiff and thereafter for judgment non obstante should have been granted; that defendants were estopped to assert some of the defenses pleaded; that the court erred in its rulings upon the evidence, and that the verdict is manifestly against the weight of the evidence. The principal defense pleaded was that the note was not executed and delivered to the payee as a binding obligation but merely as a matter of form and as an accommodation to the payee and without consideration, and also upon the express promise that defendants would never be required to pay either the principal or interest of the note. Defendants also set up the defenses that the note had been

39062

THE NATIONAL BANKING COMPANY,
Appellant,

v.

W. A. WINGOLDT et al.,
Appellees.

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

295 I.A. 643

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In an action upon a promissory note for the sum of $1,000,000, dated July 10, 1930, to the order of the National Bank of the Republic, endorsed to the Chicago Trust Company without recourse, and by Chicago Trust Company likewise without recourse to plaintiff, and upon trial by jury there was a verdict for defendants on which the court, overruling motions for a new trial and for judgment non obstante veredicto, entered judgment from which plaintiff has appealed.

It is argued for reversal that motions at the close of all the evidence for an instructed verdict for plaintiff and thereafter for judgment non obstante should have been granted; that defendants were estopped to assert some of the defenses pleaded; that the court erred in its rulings upon the evidence, and that the verdict is manifestly against the weight of the evidence. The principal defense pleaded was that the note was not executed and delivered to the payee as a binding obligation but merely as a matter of form and as an accommodation to the payee and without consideration, and also upon the express promise that defendants would never be required to pay either the principal or interest of the note. Defendants also set up the defense that the note had been

materially altered after its execution, and that plaintiff was not a holder in due course.

There is a sharp conflict in the material evidence. The uncontradicted facts established by the proofs would appear to be as follows.

The payee, the National Bank of the Republic, was a banking corporation organized under the laws of Illinois. Its capital stock, $10,500,000; its surplus, $5,000,000; its deposits, $153,000,000; its directors 49 in number. It was controlled by a management committee of 8 officers chosen from these directors. George Woodruff was chairman of the board; John W. O'Leary, president, Ward C. Castle, vice president; Lucius Teter and H. E. Otte, vice chairman; John A. Lynch, chairman of the executive committee; Charles S. Castle, Ward C. Castle and David Forgan, vice chairman. The management committee controlled the affairs of the bank.

The affiliates of the National Bank of the Republic were, first, the Chicago Trust Company, with a capital stock of $3,000,000, all of which with the exception of 10 shares each held by its 25 directors was assigned to the management committee of the National Bank of the Republic in trust for its stockholders. The directors of the Chicago Trust Company were also directors of the National Bank of the Republic. All the officers of the Chicago Trust Company were members of the management committee of the National Bank of the Republic. Lucius Teter was chairman of the board; John W. O'Leary, president; Woodruff, vice president; John A. Lynch, chairman of the executive committee; David R. Forgan and Charles S. Castle were vice chairmen of the executive committee.

The second affiliate of the National Bank of the Republic was the plaintiff, National Republic Company, organized under the General Incorporation Laws of the State of Illinois with a capital

materially altered after its execution, and that plaintiff was not a holder in due course.

There is a sharp conflict in the material evidence. The uncontradicted facts established by the proofs would appear to be as follows.

The payee, the National Bank of the Republic, was a banking corporation organized under the laws of Illinois. Its capital stock, $10,000,000; its surplus, $2,000,000; its deposits, $153,000,000; its directors 49 in number. It was controlled by a management committee of 8 officers chosen from these directors. George Woodruff was chairman of the board; John V. O'Leary, president, Ward C. Castle, vice president; Lucius Teter and H. W. Otte, vice chairman; John A. Lynch, chairman of the executive committee; Charles E. Castle, Ward C. Castle and David Forgan, vice chairman. The management committee controlled the affairs of the bank.

The affiliates of the National Bank of the Republic were, first, the Chicago Trust Company, with a capital stock of $2,000,000, all of which with the exception of 10 shares each held by its 28 directors was assigned to the management committee of the National Bank of the Republic in trust for its stockholders. The directors of the Chicago Trust Company were also directors of the National Bank of the Republic. All the officers of the Chicago Trust Company were members of the management committee of the National Bank of the Republic. Lucius Teter was chairman of the board; John V. O'Leary, president; Woodruff, vice president; John A. Lynch, chairman of the executive committee; David R. Forgan and Charles E. Castle were vice chairman of the executive committee.

The second affiliate of the National Bank of the Republic was the plaintiff, National Republic Company, organized under the General Incorporation Laws of the State of Illinois with a capital

stock of $500,000. All its shares of stock except qualifying shares of 31 directors, each of whom was also a director of the National Bank of the Republic, were held in trust for the stockholders of that bank. Samuel W. White, a director and vice-president of the National Bank of the Republic, was president of plaintiff. The capital stock of plaintiff was paid for with money provided by the National Bank of the Republic. There was inscribed on the certificates of stock of the National Bank of the Republic a statement that the holder was entitled to his pro rata share of the stock of plaintiff and of the Chicago Trust Company. January 13, 1931, the number of directors of plaintiff was reduced to 9, Woodruff, Lynch, Forgan, Otte, Charles S. and Ward C. Castle, Teter, O'Leary and Samuel W. White. William C. Freeman was executive vice-president.

A third affiliate of the National Bank of the Republic was the National Republic Investment Trust organized about August 1, 1929, by the management committee of the National Bank of the Republic. It was a common law trust. The declaration of trust provided that its trustees should be the same persons who constituted the management committee of the National Bank of the Republic; that these should be self-perpetuating and have power by a 2/3 vote to remove any existing trustee with or without cause, and that beneficiaries of the trust should not have any voice in the selection of future trustees. No investment was to be deemed improper because the trustee had a personal financial interest therein, nor because the trustee might make a profit therefrom. No beneficiary had a right to see the books. The trust was to endure 75 years. Its purpose was declared to be to deal in stocks, particularly those of state and national banks. The trustees were to be the management committee of the National Bank of the Republic; the capital of the trust was furnished by the National Bank of the Republic in the form of a loan, which has not been repaid. Plaintiff is the owner

stock of $800,000. All its shares of stock except qualifying shares of 31 directors, each of whom was also a director of the National Bank of the Republic, were held in trust for the stockholders of that bank. Samuel V. White, a director and vice-president of the National Bank of the Republic, was president of plaintiff. The capital stock of plaintiff was paid for with money provided by the National Bank of the Republic. There was inscribed on the certificates of stock of the National Bank of the Republic a statement that the holder was entitled to his pro rata share of the stock of plaintiff and of the Chicago Trust Company. January 13, 1921, the number of directors of plaintiff was reduced to 9, Woodruff, Lyman, Morgan, Otis, Charles R. and Earl O. Smith, Peter, O'Leary and Samuel V. White. William O. Freeman was executive vice-president.

A third affiliate of the National Bank of the Republic was the National Republic Investment Trust organized about August 1, 1920, by the management committee of the National Bank of the Republic. It was a common law trust. The declaration of trust provided that its trustees should be the same persons who constituted the management committee of the National Bank of the Republic; that these should be self-perpetuating and have power by a 2/3 vote to remove any existing trustee with or without cause, and that beneficiaries of the trust should not have any voice in the selection of future trustees. No investment was to be deemed improper because the trustee had a personal financial interest therein, nor because the trustee might make a profit therefrom. No beneficiary had a right to see the books. The trust was to endure 75 years. Its purpose was declared to be to deal in stocks, particularly those of state and national banks. The trustees were to be the management committee of the National Bank of the Republic; the capital of the trust was furnished by the National Bank of the Republic in the form of a loan, which has not been repaid. Plaintiff is the owner

of this loan, which it acquired at the same time it acquired the note sued on.

The original plan was that the trust should acquire stock in independent banks and thus secure to the beneficiaries the supposed benefits of branch banking. Later it was decided to substitute a corporation financed by the trust organized under the General Corporation Laws, which would secure control of desired banks through exchange of stock. This corporation was designed to be a mere holding company, which would operate the banks for the benefit of the National Bank of the Republic.

There was a fourth affiliate of the National Bank of the Republic known as the National Republic Bancorporation organized under the laws of Illinois on June 9, 1930. The organization committee was composed of Woodruff, Otte and Ward Castle of the National Bank of the Republic management committee. A circular by its promoters stated that this National Republic Bancorporation was organized for "the main purpose of acquiring by exchange of stock at least 51 per cent of the capital stock of as many of the creditable banks as possible in the outlying districts and metropolitan area of Chicago." The National Republic Bancorporation was officered by directors of the National Bank of the Republic; its capital stock was $20,000,000, divided into 1,000,000 shares; the incorporators and first directors were Woodruff, Lynch and O'Leary. February 3, 1930, the number was increased to 21, and February 14th 18 additional directors were elected. Woodruff was chairman of the board; Gustav F. Fischer, president; L. C. Laycock, vice-president; Ward C. Castle, secretary; and J.W. Jedland, treasurer. The total stock subscribed and paid for was 85,000 shares. Lynch, Woodruff and O'Leary subscribed for 8½ shares each; the Investment Trust took 84,974½ shares. In payment the Investment Trust gave 10,000 shares of the National Bank of the Republic, which the Bancorporation accepted at an agreed value of $170 a share,

of this loan, which it acquired at the same time it acquired the note held on.

The original plan was that the trust should acquire stock in independent banks and thus secure to the beneficiaries the supposed benefits of branch banking. Later it was decided to substitute a corporation financed by the trust organized under the General Corporation Law, which would secure control of desired banks through exchange of stock. This corporation was designed to be a mere holding company, which would operate the banks for the benefit of the National Bank of the Republic.

There was a fourth affiliate of the National Bank of the Republic known as the National Republic Incorporation organized under the laws of Illinois on June 2, 1920. The organization committee was composed of Woodruff, Otte and Ward Castle of the National Bank of the Republic management committee. A circular by its promoters stated that this National Republic Incorporation was organized for "the main purpose of acquiring by exchange of stock at least 51 per cent of the capital stock of as many of the creditable banks as possible in the outlying districts and metropolitan area of Chicago." The National Republic Incorporation was officered by directors of the National Bank of the Republic; its capital stock was $20,000,000, divided into 1,000,000 shares; the incorporators and first directors were Woodruff, Lyman and O'Henry. February 3, 1920, the number was increased to 31, and February 14th 15 additional directors were elected. Woodruff was chairman of the board; Gustav E. Fischer, president; L. G. Haycock, vice-president; Ward C. Castle, secretary; and J.W. Jedland, treasurer. The total stock subscribed and paid for was 85,000 shares. Lyman, Woodruff and O'Henry subscribed for 8½ shares each; the Investment Trust took 84,974½ shares. In payment the Investment Trust gave 10,000 shares of the National Bank of the Republic, which the Incorporation accepted at an agreed value of $170 a share,

although the market value was then only $150 a share. Through this plan the organization secured control of 6 outlying banks in the metropolitan area of Chicago with deposits of $41,000,000. The committee secured from 74.23% to 97.43% of the total shares of stock of these banks. The stock of the National Bank of the Republic owned by the Bancorporation was placed on its books at a value of $2,550,000, a write-up of $1,500,000, of which $1,700,000 was credited to capital and $850,000 to "earned surplus."

July 10, 1930, when the note sued on was executed, the defendant signers were directors and stockholders of the Home Bank and Trust Company, an Illinois banking corporation doing business at 1200 North Ashland avenue, Chicago. Its capital stock was $1,200,000; its deposits more than $7,000,000. Its directors were men of unusual business experience. The bank, however, was not in the best condition. Negotiations were opened for a merger with the Northwestern Bank, then with the First National, then with the Central Trust Company, and afterward with the Foreman Bank. The books were examined but nothing came of the negotiations. The examination of the State Auditor, made March 24, 1930, disclosed an unsatisfactory condition; the Auditor so wrote the Home Bank April 17th. The situation did not improve. July 8th the Auditor appeared before the board and handed them a statement as of July 3rd indicating slow assets of $1,746,666.75; doubtful, $539,437.60; worthless, $1,128,593.33. An assessment of 100% on the shares of the bank was requested. The directors appointed a committee to see Mr. Woodruff. The Clearing House Association of Chicago had been informed of the situation through Howard Sims, chief examiner, and Leslie Moon, an assistant. They received daily (and sometimes hourly) reports of the situation. Sims was at the Home Bank day and night after July 4, and after July 8 the directors of the Home Bank were in continuous session. July 9th depositors withdrew $640,000.

although the market value was then only $150 a share. Through this plan the organization secured control of 6 outlying banks in the metropolitan area of Chicago with deposits of $41,000,000. The committee secured from 74.28% to 97.46% of the total shares of stock of these banks. The stock of the national bank of the Northpublic owned by the Reconstruction was placed on its books at a value of $2,350,000, a write-up of $1,800,000, of which $1,700,000 was credited to capital and $250,000 to "earned surplus."

July 10, 1930, when the note sale on was executed, the defendant signers were directors and stockholders of the Home Bank and Trust Company, an Illinois banking corporation doing business at 1200 North Ashland avenue, Chicago. Its capital stock was $1,200,000; its deposits were then $7,000,000. Its directors were men of unusual business experience. The bank, however, was not in the best condition. Negotiations were opened for a merger with the Northwestern Bank, then with the First National, then with the Central Trust Company, and afterward with the Foreman Bank. The books were examined but nothing came of the negotiations. The examination of the State Auditor, made March 14, 1930, disclosed an unsatisfactory condition; the auditor so wrote the Home Bank April 17th. The situation did not improve. July 8th the Auditor appeared before the board and handed them a statement as of July 3rd indicating slow assets of $1,718,866.70; doubtful, $336,437.80; worthless, $1,128,333.33. An assessment of 100% on the shares of the bank was requested. The directors appointed a committee to see Mr. Woodruff. The Clearing House Association of Chicago had been interested of the situation among the lower banks, chief examiner, and health bank, an assistant. They received daily (and sometimes hourly) reports of the situation. Close was at the Home Bank day and night after July 4, and after July 8 the directors of the Home Bank were in continuous session. July 9th depositors withdrew $640,000.

The committe, with Joseph B. Fleming, employed to represent the bank, saw Woodruff. Sims also urged Woodruff to interest Bancorporation upon the theory that the Home Bank would be a good acquisition. Woodruff agreed to cause a hurried examination of assets to be made. The directors of the bank assembled at the bank building the evening of July 9th. Woodruff came later, conferred with the Auditor and then called in the directors. Hughes and Ludwig, attorneys for the Woodruff interests, were present and Hughes took notes of a proposition made by Woodruff which was, in brief, that a new Illinois bank should be organized which would assume the liabilities of the Home Bank and take over its assets. Woodruff suggested the capital of the new bank should be $750,000 with a surplus of $150,000 and undivided profits of $100,000, making a total in new assets of $1,000,000. He further suggested that the holders of the new shares should agree to exchange 50% of the stock of the new bank for stock of the Bancorporation; that the assets of the Home Bank, not taken over, should be retained and liquidated for the benefit of its stockholders. Stock in the new bank was to be offered pro rata to the stockholders of the old bank for a limited time at $133 a share. Woodruff also proposed that the directors of the old bank should make and deliver a guaranty of $500,000 in favor of the new bank to indemnify it against losses which might be incurred in realizing on assets taken from the old bank. This was called a "cushion fund." This guaranty was to be made secure by collateral. Having made these suggestions, Woodruff retired that the directors might consider the proposition. After consultation they recalled him and he was informed that the proposition was satisfactory. Woodruff then dictated for the minutes of the Home Bank Board a resolution purported to be a motion of Judge Jarecki, one of the directors, that the proposition of the National Bancorporation be accepted. Miller,

The committee, with Joseph S. Fleming, proposed to represent the bank, was Woodruff. Sims also urged Woodruff to interest Harcourt-Smith upon the theory that the home bank would be a good acquisition. Woodruff agreed to make a hurried examination of assets to be made. The directors of the bank assembled at the bank building the evening of July 12th. Woodruff came later, conferred with the Auditor and then called in the directors. Hughes and Ludwig, attorneys for the Woodruff interests, were present and Hughes took notes of a proposition made by Woodruff which was, in brief, that a new Illinois bank should be organized which would assume the liabilities of the home bank and take over its assets. Woodruff suggested the capital of the new bank should be $750,000 with a surplus of $250,000 and undivided profits of $100,000, making a total in new assets of $1,000,000. He further suggested that the holders of the new shares should agree to exchange 50% of the stock of the new bank for stock of the Harcourt-Smith; that the assets of the home bank, not taken over, should be retained and liquidated for the benefit of its stockholders. Those in the new bank was to be offered the right to the stockholders of the old bank for a limited time at $135 a share. Woodruff also proposed that the directors of the old bank should make and deliver a guaranty of $500,000 in favor of the new bank to indemnify it against losses which might be incurred in realizing on assets taken from the old bank. This was called a "mention fund." This guaranty was to be made secure by collateral. Having made these suggestions, Woodruff retired that the directors might consider the proposition. After consultation they recalled him and he was informed that the proposition was satisfactory. Woodruff then dictated for the minutes of the home bank board a resolution purported to be a motion of Judge Jarrell, one of the directors, that the proposition of the National Harcourt-Smith be accepted. Miller,

vice-president of the Bancorporation, was with Woodruff while he waited, and while they waited handed to him (blank) the note which was afterward executed. The circumstances under which the note was made and handed to Woodruff presents the controlling issue of fact in this case, upon which the evidence is in direct conflict. We shall discuss the evidence bearing on that issue later. However, it is agreed that the meeting ended about 2 a. m. July 10th. The lawyers for the parties returned to execute respective documents necessary to the organization of the new bank as agreed.

On the morning of the 10th Woodruff reported to Castle at the National Bank of the Republic to the effect that he had arranged that the National Bank of the Republic would lend to the defendants (Home Bank directors) $1,000,000 on their note, which he had brought with him, to provide the capital for the new bank. He told Castle that defendant Wieboldt alone was good for the note, and that the stock of the new bank would be put up as collateral to it. He also reported to the management committee of the Bancorporation and was authorized by it to go ahead. He also reported to the management committee of the National Bank of the Republic, who approved of what he had done. At a noon lunch the management committee approved a loan on the note. Otte then approved the note for discount and turned it over to Macferran, Loan officer of the National Bank of the Republic. Documents necessary to the organization of the new bank were sent from Fleming's office to Woodruff. Hughes suggested that Woodruff, Otte and O'Leary act as subscribers for the stock of the new bank. Woodruff suggested that clerks in the lawyers' office be used for this purpose as was usual. Hughes told him that the law then required subscribers to make affidavits as to their property holdings, and that if the bank was to open on the 11th, the papers must be filed with the Recorder by 4 o'clock that day. The three then consented to act; they subscribed for 250 shares each of the stock; became temporary

vice-president of the Bancorporation, was with Woodruff while he waited, and while they waited handed to him (Hawk) the note which was afterward executed. The circumstances under which the note was made and handed to Woodruff presents the controlling issue of fact in this case, upon which the evidence is in direct conflict. We shall discuss the evidence bearing on that issue later. However, it is agreed that the meeting ended about 2 a. m. July 10th. The lawyers for the parties returned to execute respective documents necessary to the organization of the new bank as agreed.

On the morning of the 10th Woodruff reported to Castle at the National Bank of the Republic to the effect that he had arranged that the National Bank of the Republic would lend to the defendants (Home Bank directors) $1,000,000 on their note, which he had brought with him, to provide the capital for the new bank. He told Castle that defendant Wiscofit alone was good for the note, and that the stock of the new bank would be put up as collateral to it. He also reported to the management committee of the Bancorporation and was authorized by it to do so. He also reported to the management committee of the National Bank of the Republic, who approved of what he had done. At a noon luncheon the management committee approved a loan on the note. Otte then approved the note for discount and turned it over to Masterson, loan officer of the National Bank of the Republic. Documents necessary to the organization of the new bank were sent from Fleming's office to Woodruff. Hughes suggested that Woodruff, Otte and O'Leary act as subscribers for the stock of the new bank. Woodruff suggested that clerks in the lawyers' office be used for this purpose as was usual. Hughes told him that the law then required subscribers to make affidavits as to their property holdings, and that if the bank was to open on the 11th, the papers must be filed with the Recorder by 4 o'clock that day. The three then consented to act; they subscribed for 250 shares each of the stock; became temporary

directors and officers of the new bank. Officers of the National Bank of the Republic then brought in $1,000,000 and turned it over to Woodruff, O'Leary and Otte as officers of the new bank. An Assistant State Auditor was present and counted the cash, and saw that it was deposited in the National Bank of the Republic to the credit of the United American Trust & Savings Bank, the name under which the new bank was organized. The charter was recorded before 4 o'clock p. m. of that day. Of the $1,000,000 in new capital $996,000 was proceeds of this note; $4000 was paid by Woodruff, Otte and O'Leary. Macferran caused a requisition to be made out for a cashier's check directed to the National Bank of the Republic for $1,000,000. The requisition directed to the National Bank of the Republic to pay $1,000,000 was: "To the order of the National Bank of the Republic agent for a/c of Individuals whose names appear on reverse side of this check as proceeds of Demand Note dated 7-10-30 signed by them. Proceeds of this check to be used in payment of the purchase of stock in the United American Tr. & Sav. Bank, Chicago by said individuals." A cashier's check was then made out as follows:

> "Chicago, July 10, 1930.
> Pay to the Order of National Bank of The Republic agent for a/c of Individuals whose names appear on reverse side of this check as proceeds of Demand note dated 7/10/30 signed by them. Proceeds of this check to be used in payment of the purchase of stock in the United American Trust and Savings Bank, Chicago by said individuals, $1,000,000."

The names of the 15 signers of the note are typewritten on the back of the cashier's check and on the back of the order. An account was opened in the liability ledger of the National Bank of the Republic for the 15 signers; $1,000,000 was charged to this account. The proceeds of the cashier's check were credited to Woodruff, Otte and O'Leary; they then drew their checks in payment of their stock subscriptions to the new bank, the United American Trust & Savings Bank. $1,000,000 in cash was credited to the new bank, which two days later drew it out and used it. The money

directors and officers of the new bank. Officers of the National Bank of the Republic then brought in $1,000,000 and turned it over to Woodruff, O'Neary and Otte as officers of the new bank. An Assistant State Auditor was present and counted the cash, and saw that it was deposited in the National Bank of the Republic to the credit of the United American Trust & Savings Bank, the name under which the new bank was organized. The charter was recorded before 4 o'clock p. m. of that day. Of the $1,000,000 in new capital $976,000 was proceeds of this note; $4000 was paid by Woodruff, Otte and O'Neary. Westerman caused a requisition to be made out for a cashier's check directed to the National Bank of the Republic for $1,000,000. The requisition directed to the National Bank of the Republic to pay $1,000,000 was: "To the order of the National Bank of the Republic agent for a/c of Individuals whose names appear on reverse side of this check as proceeds of Demand Note dated 7-10-30 signed by them. Proceeds of this check to be used in payment of the purchase of stock in the United American Trust & Savings Bank, Chicago by said Individuals. $1,000,000."

"Chicago, July 10, 1930.

For the order of National Bank of the Republic agent for a/c of Individuals whose names appear on reverse side of this check as proceeds of Demand note dated 7\10\30 signed by them. Proceeds of this check to be used in payment of the purchase of stock in the United American Trust and Savings Bank, Chicago by said Individuals. $1,000,000."

The names of the 15 signers of the note are typewritten on the back of the cashier's check and on the list of the order. An account was opened in the liability ledger of the National Bank of the Republic for the 15 signers; $1,000,000 was charged to this account. The proceeds of the cashier's check were credited to Woodruff, Otte and O'Neary; they then drew their checks in payment of their stock subscriptions to the new bank, the United American Trust & Savings Bank. $1,000,000 in cash was credited to the new bank, which two days later drew it out and used it. The money

paid by Woodruff, Otte and O'Leary for their qualifying shares in the new bank was credited to their accounts in the National Bank of the Republic and also to their own personal accounts. The words "agent for" were not on the requisition nor in the cashier's check as first written. New instruments were afterward drawn in which these words were inserted. All this bookkeeping was, so far as the evidence shows, without the knowledge of any of the 15 signers of the note. Woodruff explains that it was inconvenient to assemble the 15. The note was entered on the note register of the National Bank of the Republic. The 15 signers were charged in the liability ledger with $1,000,000. None of them, it appears, had knowledge of this charge.

July 12th the new bank was formally opened in the old bank building. The first meeting of the stockholders thereafter was held July 15th. The number of directors was increased from the three (Woodruff, Otte and O'Leary) to 17. All the signers of the note, with the exception of Evans and Carlsen, were elected directors of the new bank. Hall, Tykal and Fischer were added as directors. Wieboldt was elected chairman. This organization continued until the new bank was closed by the State Auditor in the summer of 1932.

August 14, 1930, Mr. Wieboldt wrote the National Bank of the Republic:

"I beg leave to inquire as to the status of the $1,000,000 demand note which I, jointly with other directors of the Home Bank and Trust Company, signed the night of July 10-11 to help facilitate the organization of the United American Trust and Savings Bank.

Is it possible that said note be cancelled at this time. If not, what steps need to be taken to have it canceled. You may know that I, and I presume all the directors, feel rather uneasy to have this note remain in effect much longer."

August 18, 1930, The National Republic Bancorporation, by Tykal, replied:

"In reply to your letter of the 14th regarding the million-dollar demand note that you signed jointly with other directors of the Home Bank & Trust Co., this note is of course, still held by the National

paid by Woodruff, Otte and O'Henry for their qualifying shares in the new bank was credited to their accounts in the National Bank of the Republic and also to their own personal accounts. The words "agent for" were not on the registration nor in the cashier's check as first written. Now instruments were afterward drawn in which these words were inserted. All this bookkeeping was, so far as the evidence shows, without the knowledge of any of the 15 signers of the note. Woodruff explains that it was inconvenient to assemble the 15. The note was entered on the note register of the National Bank of the Republic. The 15 signers were charged in the liability ledger with $1,000,000. None of them, it appears, had knowledge of this course.

July 12th the new bank was formally opened in the old bank building. The first meeting of the stockholders thereafter was held July 15th. The number of directors was increased from the three (Woodruff, Otte and O'Henry) to 17. All the signers of the note, with the exception of Evans and Carlson, were elected directors of the new bank. Hall, Tyrell and Fischer were added as directors. Wiebolt was elected chairman. This organization continued until the new bank was closed by the state auditor in the summer of 1932.

August 14, 1930, Mr. Wiebolt wrote the National Bank of the Republic:

"I beg leave to inquire as to the status of the $1,000,000 demand note which I, jointly with other directors of the Home Bank and Trust Company, signed the night of July 10-11 to help reorganize the organization of the United American Trust and Savings Bank.

Is it possible that said note be cancelled at this time. If not, what steps need to be taken to have it cancelled. You may know that I, and I presume all the directors, feel rather uneasy to have this note remain in effect much longer."

August 15, 1930, The National Republic Bank corporation, by Tyrell, replied:

"In reply to your letter of the 14th regarding the million-dollar demand note that you signed jointly with other directors of the Home Bank & Trust Co., this note is of course, still held by the National

Bank of the Republic.

Warrants to subscribe for new shares of the United American Trust & Savings Bank expired August 12th, but all of the cash for the subscriptions has not yet been collected. The proceeds from the sale of this stock will be applied on the note. Quite a number of people want to purchase the new stock after the meeting of Home Bank & Trust Company stockholders to be held August 28th, and consequently nothing will be done about the stock until after this meeting.

Shortly after September 1st any unsold part of stock will be offered for sale at the then market price to new interests, and as fast as the stock is sold the note will be reduced the amount of the sales. As the stock of the United American Trust & Savings Bank and the National Republic Bancorporation are held as collateral to the note, the signers would seem to have but slight liability thereon.

The signers of the note will be consulted in regard to the enture situation after September 1, 1930."

The unsold shares of stock in the new bank were issued to Frank A. Curda, who exchanged 51% of them for Bancorporation shares. By declarations of trust made July 10, 1930, and July 27 thereafter, he asserted that he held the stock in trust for the 15 signers of the note; he so notified the Commissioner of Internal Revenue when making his income tax return, and also notified Hall, the new president of the new bank. Defendants, however, were not informed of this. In the fall of 1930 Drymalski at Wieboldt's request asked Woodruff about the note. Woodruff told him to tell Wieboldt not to worry. He had not pressed for interest and hoped the new bank stock would soon be sold. The stockholders of the old (Home) bank took and paid for stock in the new bank to the amount of $97,866.66, which was sent to the National Bank of the Republic by Martin Johnson, cashier of the old and also of the new bank. This amount was credited on the note.

July 11, 1930, Woodruff, Otte and O'Leary resigned as directors of the new bank after passing a resolution approving the contract whereby the new bank took the assets of the old and assumed its liabilities as per minutes drawn in Fleming's office. As already stated, Charles C. Hall was elected president of the new bank. July 17 the new bank sent a letter to the old stockholders with warrants attached giving the privilege of subscribing for the new stock of the new bank

Bank of the Republic.

Warrants to subscribe for new shares of the United American Trust & Savings Bank expired August 15th, but all of the cash for the subscriptions was not yet been collected. The proceeds from the sale of this stock will be applied on the note. Quite a number of people want to purchase the new stock after the meeting of Home Bank & Trust Company stockholders to be held August 25th, and consequently nothing will be done about the stock until after this meeting.

Shortly after September last any unsold part of stock will be offered for sale at the then market price to new interests, and as fast as the stock is sold the note will be reduced the amount of the sales. As the stock of the United American Trust & Savings Bank and the National Republic Incorporation are held as collateral to the note, the signers would seem to have but slight liability thereon.

The signers of the note will be consulted in regard to the future situation after September 1, 1930."

The unsold shares of stock in the new bank were issued to Frank A. Gurde, who exchanged 51% of them for Incorporation shares. By declarations of trust made July 10, 1930, and July 27 thereafter, he asserted that he held the stock in trust for the 15 signers of the note; he so notified the Commissioner of Internal Revenue when making his income tax return, and also notified Hall, the new president of the new bank. Defendants, however, were not informed of this. In the fall of 1930 President at Wadsdorf's request asked Woodruff about the note. Woodruff told him to tell Wadsdorf not to worry. He had not pressed for interest and hoped the new bank stock would soon be sold. The stockholders of the old (Home) bank took and paid for stock in the new bank to the amount of $97,805.66, which was sent to the National Bank of the Republic by Martin Johnson, cashier of the old and also of the new bank. This amount was credited on the note.

July 11, 1930, Woodruff, Otte and O'Hearn resigned as directors of the new bank after passing a resolution approving the contract whereby the new bank took the assets of the old and assumed its liabilities as per minutes drawn in Fleming's office. As already stated, Charles O. Hall was elected president of the new bank. July 17 the new bank sent a letter to the old stockholders with warrants attached giving the privilege of subscribing for ~~the~~ stock of the new bank

upon condition that one-half of this stock should be exchanged for Bancorporation stock. The letter said that the stock not purchased by the old subscribers would be taken by members of the new board. The letter erroneously stated that Bancorporation owned a majority of the stock of the National Bank of the Republic. This was corrected by a later letter. About a year later, July 25, 1931, the National Bank of the Republic was merged with the Central Trust Company under the name of Central Republic Bank & Trust Company. At the request of David R. Forgan, Woodruff and the signers of the note met at the National Bank of the Republic. Woodruff asked the signers to make the note eligible to become part of the assets of the United Bank by paying interest at the rate of 4%. It was suggested that the signers retire to consider the matter; with their attorney they went to the Union League Club; a few days later, with their attorney Fleming, who spoke for them, they told Forgan that Woodruff promised prior to the execution of the note that the signers would never under any circumstance be called upon to pay it. Forgan replied that he had never heard of this, and that Woodruff had no authority to make any such promise. Fleming denounced any attempt to collect the note as a fraud, said the whole crowd were a bunch of "cheap-skates". June 26th notice in writing was given the Chicago Trust Company, the Central Trust Company and the National Republic Bancorporation that the signers of the note denied any liability thereon. The note was thereafter transferred without recourse to the Chicago Trust Company, and thereafter without recourse to plaintiff. The foregoing are, we think, uncontradicted facts in the record. Conflicting evidence will be considered in the discussion of issues to which it is applicable.

Plaintiff contends in the first place that it is a holder in due course. To this contention secs. 16, 52, 53 and 55 of the Negotiable Instrument Law are applicable. The relationship between

upon condition that one-half of this stock should be exchanged for Reconstruction stock. The letter said that the stock not purchased by the old subscribers would be taken by members of the new board. The letter erroneously stated that reconstruction owned a majority of the stock of the National Bank of the Republic. This was corrected by a later letter. About a year later, July 25, 1871, the National Bank of the Republic was merged with the Central Trust Company under the name of Central Republic Bank & Trust Company. At the request of David R. Forgan, Woodruff said the signers of the note met at the National Bank of the Republic. Woodruff asked the signers to make the note eligible to become part of the assets of the United Bank by paying interest at the rate of 6%. It was suggested that the signers retire to consider the matter; with their attorney they went to the Union League Club; a few days later, with their attorney Fleming, who spoke for them, they told Forgan that Woodruff promised prior to the execution of the note that the signers would never under any circumstances be called upon to pay it. For an replied that he had never heard of this, and that Woodruff had no authority to make any such promise. Fleming denounced any attempt to collect the note as a fraud, said the whole crowd were a bunch of "cheap-skates". June 20th notice in writing was given the Chicago Trust Company, the Central Trust Company and the National Republic Reorganization that the signers of the note denied any liability thereon. The note was thereafter transferred without recourse to the Chicago Trust Company, and thereafter without recourse to plaintiff. The foregoing are, we think, uncontradicted facts in the record. Conflicting evidence will be considered in the discussion of issues to which it is applicable.

Plaintiff contends in the first place that it is a holder in due course. In this contention see, 13, 23, 25 and 55 of the Negotiable Instrument Law are applicable. The relationship between

payee, National Bank of the Republic, and its affiliated corporations, trusts, etc., the dominant relationship of Woodruff, who took the note to the payee and its affiliates; his complete knowledge of the whole transaction; the fact that the note was a demand note upon which for more than one year neither interest nor principal were paid; make it impossible to hold that plaintiff took the note in good faith and without knowledge of equities. On the contrary we hold as a matter of law that plaintiff did not take the note here sued on in good faith. Moreover, this was a demand note and it was not negotiated within a reasonable time. (Ill. State Bar Stats., 1937, chap. 98, sec. 53, par. 73, p. 2134.) Greer v. Downing, 176 Ill. App. 355; Consiglio v. Longhi, 205 Ill. App. 441; Gordon v. Mapel, 311 Pa. 523, 165 Atl. 496; McAdam v. Grand Forks, etc., 24 N. D. 645, 140 N. W. 725, 47 L.R.A. (N.S.) 246.)

By reason of our conclusion on this and other points it becomes unnecessary to consider the further suggestion of defendants (based on Crichfield v. Bermudez Paving Co., 174 Ill. 466, and Continental Wall Paper Co. v. Voight, 212 U. S. 227, 53 L. Ed. 386.) that this court should (although the question was not raised in the trial court) affirm the judgment because, as it is said, the purpose for which the note was executed and delivered was illegal and known by all the parties to be illegal, namely, to evade the law of this State against branch banking.

On behalf of defendants it is contended that the note was materially altered by Woodruff without the consent of the makers, and that for this reason, as a matter of law, plaintiff cannot recover. At the time of the execution of the note it had not been determined what the name of the new bank would be. The alteration consists, as defendants assert, in the insertion by Woodruff in longhand and in an appropriate blank of the phrase:

"7500 shares of United American Tr. & Sav. Bank (3750 of which are to be exchanged for 22,500 shares of Natl.Republic Bancorporation stock)."

payee, national bank of the Republic, and its affiliated corporations, trusts, etc., the president relationship of secretary, who took the note to the payee and its affiliates; his complete ignorance of the whole transaction; the fact that the note was a demand note upon which for more than one year neither interest nor principal were paid; that it impossible to have been plaintiff took the note in good faith and without knowledge of equities. In the contrary we hold as a matter of law that plaintiff did not take the note here sued on in good faith. However, this was a demand note and it was not negotiated within a reasonable time. (III. State Bar Stats., 1937, chap. 98, sec. 88, par. 76, p. 1124.) Wright v. Cunningham, 179 Ill. App. 378; Donegin v. Lagan, 93 Ill. App. 441; Gordon v. Hagel, 211 Ill. 255, 103 Ill. 475; Rodgers v. Ward Trans. etc., 24 F. D. 645, 140 F. W. 750, 47 L.R.A. (N.S.) 346.)

By reason of our conclusion on this and other points it becomes unnecessary to consider the further suggestion of defendants (based on Grimfield v. Surgeons Pulmo Co., 171 Ill. 444, and Continental Tail Paper Co. v. Voight, 212 U. S. 227, 53 L. ed. 330.) that this court should (although the question was not raised in the trial court) affirm the judgment because, as it is said, the purpose for which the note was executed and delivered was illegal and known by all the parties to be illegal, namely, to evade the law of this State against stock watering.

On behalf of defendants it is contended that the note was materially altered by Bockrath without the consent of the maker, and that for this reason, as a matter of law, plaintiff cannot recover. At the time of the execution of the note it had not been determined what the name of the new bank would be. The alteration complained, defendants assert, in the insertion by Bockrath in longhand and in an appropriate blank of the phrase:

"7500 shares of United American Tr. & Sav. Bank (3750 of which are to be exchanged for 22,500 shares of Bell Republic Incorporation stock)."

The evidence is conflicting on this point. The testimony for plaintiff is that Woodruff wrote the note, leaving space only for the insertion of the name of the new bank after it should have been determined, and that this name and no more was written after the execution of the note. Defendants say the space was entirely blank when they signed the note, and that the whole phrase (not the name of the bank alone) was inserted after they signed. They now contend this was a material alteration which makes the note invalid. Here again the evidence was conflicting and the verdict of the jury is for defendants. We may therefore assume that the entire phrase was written in after the execution of the note. Nevertheless we are of the opinion that this did not constitute a material alteration such as would render the note invalid. The phrase written in longhand refers to and is limited to that part of the agreement relating to the collateral to be deposited to secure the payment of the note. The note signed was a collateral note. The photostatic copy sent to Mr. Wieboldt at his request five days after the execution thereof shows that this phrase written in longhand was then in the instrument just as it now is. The agreement as to collateral which followed the note proper was in effect an independent and separate instrument. The matter which defendants claim was inserted was not in any sense an alteration of the note itself, nor could it affect in any material way the terms of the note or the promise therein. This is a suit on the note. It is not a suit on the collateral agreement attached to the note. We hold (assuming that the insertion was made as defendants say) this did not affect the unconditional promise to pay. Chelsea Exchange Bank v. Warner, 195 N.Y.S. 419; Alexandria Bank v. Honeycutt, 108 So. 475-76; Keller v. Rock Island State Bank, 292 Ill. 553-57-58.

The substantial defense to this suit is that the note on which the suit is based was made and delivered without consideration

The evidence is conflicting on this point. The testimony for plaintiff is that Coolidge wrote the note, leaving space only for the insertion of the name of the new bank after it should have been determined, and that this space was not so more was written after the execution of the note. Defendants say the space was entirely blank when they signed the note, and that the words (but the name of the bank alone) was inserted after they signed. They now contend this was a material alteration which makes the note invalid. Here again the evidence was conflicting and the verdict of the jury is for defendants. We may therefore assume that the entire phrase was written in after the execution of the note. Nevertheless we are of the opinion that this did not constitute a material alteration such as would render the note invalid. The phrase written in longhand refers to and is limited to that part of the agreement relating to the collateral to be deposited to secure the payment of the note. The note signed was a collateral note. The photostatic copy sent to Mr. Filsnight at his request five days after the execution clearly shows that this phrase written in longhand was then in the instrument just as it now is. The agreement as to collateral which followed the note proper was in effect an independent and separate instrument. The matter which defendants claim was inserted was not in any sense an alteration of the note itself, nor could it affect in any material way the terms of the note or the promise therein. This is a suit on the note. It is not a suit on the collateral agreement attached to the note. The suit (assuming that the insertion was made as defendants say) did not affect the consideration promised to pay. Chalmers Commercial Paper, 7th ed., 419; Lilienthal Sons v. Hornsby, 1 Ga. App. 474-476; Fuller v. First National Bank of Ga., 85 Ga. 663-667.

The substantial defense to this suit is that the note on which the suit is based was made and delivered without consideration

for the accommodation of the payee and without any intention by any of the parties to give effect to it as a binding document. The evidence bearing on this issue is conflicting. Woodruff (best informed of any of plaintiff's witnesses) testifies that he arrived at the Home Bank on the night of July 9th at about 11 o'clock with Fleming. McCreight, who was in charge of his auditors, was there. He tells, as we have already related, of the proposition he made to the directors that they should organize a new bank to take over the old one, the directors of the old bank giving personally a $500,000 guaranty in favor of the new bank to be organized. Woodruff says that in this connection he suggested a loan of $1,000,000 from the National Bank of the Republic and told the directors (defendants here) that he would be glad to recommend such a loan to the proper officers of the National Bank of the Republic, but that he himself had no authority to make it. He says that to a question as to whether he would buy part of the stock of the new bank, he said that when they got down to the bottom of the barrel if there was a little stock that had not been sold he thought the "Bancorporation boys" would be glad to sell it for them. He denies that at any time he said that the National Bank of the Republic would buy the stock of the new bank. He says he and those with him retired from the room that the directors of the old bank might confer together, and that while outside of the conference room W. H. Miller produced this note in blank, which he (Woodruff) then filled out. He says at that time he had decided not to ask the directors to sign the note that night. He was recalled to the directors' room and informed the directors had not quite raised the guaranty fund. He told them, he says, that this was the only guaranty they would have to sign, but did not tell them (as he puts it) that it was the only obligation they would have to assume. He and his group again retired

for the accommodation of the payee and without any intention by any of the parties to give effect to it as a binding document.

The evidence bearing on this issue is conflicting. Woodruff (best informed of any of Hartfiff's witnesses) testifies that he arrived at the Home Bank on the night of July 9th at about 11 o'clock with Fleming. Cortright, who was in charge of his auditors, was there. He tells, as we have already related, of the proposition he made to the directors that they should organize a new bank to take over the old one, the directors of the old bank giving personally a $500,000 guaranty in favor of the new bank to be organized. Woodruff says that in this connection he suggested a loan of $1,000,000 from the National Bank of the Republic and told the directors (defendants here) that he would be glad to recommend such a loan to the proper officers of the National Bank of the Republic, but that he himself had no authority to make it. He says that to a question as to whether he would buy part of the stock of the new bank, he said that when they got down to the bottom of the barrel if there was a little stock that had not been sold he thought the "bancorporation boys" would be glad to sell it for them. He denies that at any time he said that the National Bank of the Republic would buy the stock of the new bank. He says he and those with him retired from the room that the directors of the old bank might confer together, and that while outside of the conference room W. H. Miller produced this note in blank, which he (Woodruff) then filled out. He says at that time he had decided not to ask the directors to sign the note that night. He was recalled to the directors' room and informed the directors had not quite raised the guaranty fund. He told them, he says, that this was the only guaranty they would have to sign, but did not tell them (as he puts it) that it was the only obligation they would have to assume. He and his group again retired

and the directors, after further consultation, asked him to return and told him that the balance of the guaranty fund had been provided for by the subscription of Mr. Wieboldt. Woodruff then dictated in the name of Judge Jarecki a resolution accepting the offer of the Bancorporation. Everyone shook hands and all got ready to go home. Woodruff says that someone said something about a possible run on the bank the next morning; at this time he informed the directors of this suggestion and made a further proposal that the new bank be organized that night instead of waiting until the next day. Woodruff says he told those present that they could organize a new bank in a few hours; that he then asked the directors defendants to sign the note; Woodruff says Wieboldt hesitated but signed first; most of the others signed thereafter without further argument. Woodruff says he told defendants that in signing they assumed a very slight liability; the Bancorporation would assist them in every way in disposing of the new stock. He denies saying the signers would never have to pay anything. Hughes, Miller, Sims, Edgerton, Ludwig, McCreight and others give evidence tending to corroborate Woodruff. The witnesses agree, however, that nothing whatever was said about the execution of this note until after the directors had raised the guaranty fund. Neither Woodruff nor any other witness says that when presenting his plan he explained to the directors that it would be necessary for them in addition to giving the guaranty to subscribe for the stock of the new bank and provide a million dollars additional funds to get it going. Wieboldt says when the matter of the guaranty fund was settled it was about 2:15 or 2:30 a. m.; that all got up, some went to the vestibule to get their hats; they were called back and, he says, "stunned" to hear Woodruff suggest they should sign this note. Wieboldt says that Woodruff told them he would have to get the money from the National Bank of the Republic and that he could not just go there as a director or as chairman of the board and take it out; he

and the directors, after further consultation, asked him to re-
turn and told him that the balance of the guaranty fund had been
provided for by the subscription of Mr. Wisdolf. Woodruff then
dictated in the name of Judge Jarecki a resolution accepting the
offer of the Bancorporation. Everyone shook hands and all got
ready to go home. Woodruff says that someone said something about
a possible run on the bank the next morning; at this time he in-
formed the directors of this suggestion and made a further pro-
posal that the new bank be organized that night instead of wait-
ing until the next day. Woodruff says he told those present that
they could organize a new bank in a few hours; that he then asked
the directors to sign the note; Woodruff says Wisdolf
hesitated but signed first; most of the others signed thereafter
without further argument. Woodruff says he told defendants that
in signing they assumed a very slight liability; the Bancorpora-
tion would assist them in every way in disposing of the new stock.
He denies saying the signers would never have to pay anything.
Hughes, Miller, Sims, Sullivan, Ludwig, McCreight and others give
evidence tending to corroborate Woodruff. The witnesses agree,
however, that nothing whatever was said about the execution of this
note until after the directors had raised the guaranty fund. Neither
Woodruff nor any other witness says that when presenting his plan
he explained to the directors that it would be necessary for them
in addition to giving the guaranty to subscribe for the stock of the
new bank and provide a million dollars additional funds to get it
going. Wisdolf says that the matter of the guaranty fund was set-
tled it was about 2:15 or 2:30 a. m.; that all got up, some went to
the vestibule to get their hats; they were called back and, he says,
"stunned" to hear Woodruff suggest they sign this note.
Wisdolf says that Woodruff told them he would have to get the money
from the National Bank of the Republic and that he could not just go
there as a director or as chairman of the board and take it out; he

would have to have something to get the money; he was not asking for a valid note; he was just asking for an accommodation note to help him get the money as an accommodation to the National Bank of the Republic; that the note would not be a binding obligation; that it was just a matter of form to help Woodruff get the money; that the Home Bank had been losing deposits at the rate of $1000 a day and he did not want to take over a closed bank; that the National Bank of the Republic would designate persons to subscribe for all the capital stock of the bank; that there might be a big run on the bank that morning; that the note he was asking them for was just to be used in the event they would have to save the situation in case of a run, and that the note would be canceled just as soon as the new bank was organized; that the note would not be transferred. Wieboldt says it had been only a few minutes since Woodruff told them they would not be asked to do anything else if they raised the "cushion fund" and he (Wieboldt) said, "I cannot sign that note." Wieboldt says attorney Fleming then said to Woodruff, "You have assured these gentlemen that this note is just a temporary affair, just an accommodation note, that it is not a legal binding obligation, that it is just a matter of form", and that upon this assurance by Woodruff Attorney Fleming told Wieboldt he thought it was safe for him to sign the note under the circumstances.

Fleming also testified. He says that after the directors were called back Woodruff spoke about the withdrawals that had been made from the old bank and the possibility of a run on it, and that he wished the note for protection "in case of an emergency," in case they had to advance the money or send money to the Home Bank before the new bank organized and the obligations of the old bank were assumed by the new bank; that when the directors demurred Woodruff said it was merely a temporary matter, a matter of convenience in the organization of the bank, an accommodation to the National Bank of the Republic; that the signers would not be called upon to pay the

would have to have something to get the money; he was not asking for a valid note; he was just asking for an accommodation note to help him get the money as an accommodation to the National Bank of the Republic; that the note would not be a binding obligation; that it was just a matter of form to help Woodruff get the money; that the Home Bank had been losing deposits at the rate of $1000 a day and he did not want to take over a closed bank; that the National Bank of the Republic would designate persons to subscribe for all the capital stock of the bank; that there might be a big run on the bank that morning; that the note he was asking them for was just to be used in the event they would have to pay the situation in case of a run, and that the note would be cancelled just as soon as the new bank was organized; that the note would not be transferred. Wiebolt says it had been only a few minutes since Woodruff told them they would not be asked to do anything else if they raised the "emaion fund" and he (Wiebolt) said, "I cannot sign that note." Wiebolt says attorney Fleming then said to Woodruff, "You have assured these gentlemen that this note is just a temporary affair, just an accommodation note, that it is not a legal binding obligation, that it is just a matter of form", and that upon this assurance by Woodruff attorney Fleming told Wiebolt he thought it was safe for him to sign the note under the circumstances.

Fleming also testified. He says that after the directors were called back Woodruff spoke about the withdrawals that had been made from the old bank and the possibility of a run on it, and that he wished the note for protection "in case of an emergency," in case they had to advance the money or send money to the home bank before the new bank organized and the obligations of the old bank were assumed by the new bank; that when the directors declared Woodruff said it was merely a temporary matter, a matter of convenience in the organization of the bank, an accommodation to the National Bank of the Republic; that the signers would not be called upon to pay the

note at any time. He says that Woodruff said that while it was true that "we are organizing the bank, myself, Mr. O'Leary, the President of the National Bank of the Republic, and Mr. Otte, Vice-president of that bank, we three, we will subscribe for that stock and that is our undertaking. We will sell that stock immediately. *** In signing this note you assume no responsibility whatever. It is not and will not be your legal obligation of any of you. It is a matter of convenience in the event a situation should arise today where there would be a run on this bank we would have to advance money to protect the bank. That is the purpose of it. And when the new bank is organized, the note wull be returned to you, canceled." Fleming said the directors still protesting, Woodruff further said: "Well, while O'Leary, the president of the National Bank of the Republic, Mr. Otte, the vice-president, and myself, will organize the bank, we will subscribe for all of the stock, but what is done has to be done quickly, because the National Bank has no right to advance money to us, the three of us being officers of the bank, unless and until we have an opportunity to lay the matter before the directors and get their approval." Fleming says the directors again protested, but Woodruff a half dozen times repeated the statement that there would be no legal obligation, and gave them all assurance that he wanted them to understand that this would not be their personal obligation but was a matter of convenience to him and to the bank. Fleming says Woodruff said, "It is an accommodation of myself and The National Bank of the Republic, to our bank. We are organizing it and we are subscribing for the stock and you will not be called upon to pay that note. The note will be canceled as soon as the new bank is organized." Again the directors protesting, Woodruff repeated (Fleming says) that it was a matter of form, an accommodation to the National Bank of the Republic; that they could not get the directors together in time to raise the money, and they must have $1,000,000 right away. Fleming says Wieboldt asked him if he

note at any time. He says that Woodruff said that while it was true that "we are organizing the bank, myself, Mr. O'Leary, the President of the National Bank of the Republic, and Mr. Otte, Vice-President of that bank, we three, we will subscribe for that stock and that is our undertaking. We will sell that stock immediately. *** In signing this note you assume no responsibility whatever. It is not that will not be your legal obligation of any of you. It is a matter of convenience in the event a situation should arise today where there would be a run on this bank we would have to advance money to protect the bank. That is the purpose of it. And when the new bank is organized, the note will be returned to you, cancelled." Fleming said the directors still protesting, Woodruff further said: "Well, while O'Leary, the president of the National Bank of the Republic, Mr. Otte, the vice-president, and myself, will organize the bank, we will subscribe for all of the stock, but that is none has to be done quickly, because the National Bank has no right to advance money to us, the three of us being officers of the bank, unless and until we have an opportunity to lay the matter before the directors and get their approval." Fleming says the directors again protested, but Woodruff a half dozen times repeated the statement that there would be no legal obligation, and gave them all assurance that he wanted them to understand that this would not be their personal obligation but was a matter of convenience to him and to the bank. Fleming says Woodruff said, "It is an accommodation of myself and the National Bank of the Republic, to our bank. We are organizing it and we are subscribing for the stock and you will not be called upon to pay that note. The note will be cancelled as soon as the new bank is organized." Again the directors protesting, Woodruff repeated (Fleming says) that it was a matter of form, an accommodation to the National Bank of the Republic; that they could not get the directors together in time to raise the money, and they must have $1,000,000 right away. Fleming says Kimball asked him if he

(Wieboldt) could sign the note without incurring any liability, and that in the presence of all the gentlemen he (Fleming) said to Woodruff, "As I understand it, you are talking now in behalf of the National Bank of the Republic," and he replied, "Yes.' 'And the National Bank of the Republic is going to undertake to organize this bank?' He replied, 'Yes.' 'The stock will be subscribed for by those three gentlemen, there will be no responsibility on the part of these men, whom you are asking to sign this note?' His answer was, 'Yes.' 'It is merely an accommodation to the bank, The National Bank of the Republic, and in no event is it to be considered a personal obligation of any of the people who signed?'" Woodruff, Fleming says, replied "Yes." Fleming then said to Mr. Wieboldt, Judge Jarecki and other defendants, "Now, you have all heard what Mr. Woodruff says. You all have his assurance you will never be called upon to pay, that the matter is merely temporary for an emergency purpose and will be returned to you as soon as the new bank is organized." Fleming also said he at that time formed an opinion as to the legal validity of the note signed under such circumstances, and expressed that opinion to Mr. Wieboldt in Woodruff's presence, telling him that under those circumstances, and with those assurances the note would not be good. Fleming also says that Judge Sonsteby, who was present representing defendant Carlsen, asked similar questions, to which Woodruff made similar replies.

While they differ as to details, the testimony of defendants is substantially the same as that given by Wieboldt and Fleming. Wieboldt says he does not remember that Woodruff said that he and Otte and O'Leary would subscribe for the stock in the new bank, but all the witnesses, including Judge Sonsteby, testify in substance that the note was signed and delivered upon the condition that it should be used only in case of emergency which might arise pending the organization of the new bank, and that the note was given solely for

(Wiebolt) could sign the note without incurring any liability, and that in the presence of all the gentlemen he (Fleming) said to Woodruff, "As I understand it, you are taking now in behalf of the National Bank of the Republic," and he replied, "Yes." "And the National Bank of the Republic is going to undertake to organize this bank?" he replied, "Yes." "The stock will be subscribed for by those three gentlemen, there will be no responsibility on the part of these men, when you are asking to sign this note?" his answer was, "Yes." "It is merely an accommodation to the bank, The National Bank of the Republic, and in no event is it to be considered a personal obligation of any of the people who signed?" Woodruff, Fleming says, replied "Yes." Fleming then said to Mr. Wiebolt, Walter Tarbert and other defendants, "Now, you have all heard what Mr. Woodruff says. You all have his assurance you will never be called upon to pay, that the matter is merely temporary for an emergency purpose and will be returned to you as soon as the new bank is organized." Fleming also said he at that time formed an opinion as to the legal validity of the note signed under such circumstances, and expressed that opinion to Mr. Wiebolt in Woodruff's presence, telling him that under those circumstances, and with those assurances the note would not be good. Fleming also says that Judge Gormsby, who was present representing defendant Carlson, asked similar questions, to which Woodruff made similar replies.

While they differ as to details, the testimony of defendants is substantially the same as that given by Wiebolt and Fleming. Wiebolt says he does not remember that Woodruff said that he and Otte and O'Leary would subscribe for the stock in the new bank, but all the witnesses, including Judge Gormsby, testify in substance that the note was signed and delivered upon the condition that it should be used only in case of emergency which might arise pending the organization of the new bank, and that the note was given solely for

accommodation. It is quite impossible to discuss in detail all the evidence of the witnesses on this point. The probabilities and improbabilities of the testimony of the witnesses has been discussed at length in voluminous briefs. Every minute circumstance tending to corroborate the testimony on one side or the other has been called to our attention, including affidavits filed by defendants in support of their motion to set aside the judgment by confession, which plaintiff contends is so contradictory of the evidence given at the hearing as to constitute a variance on account of which an instruction for plaintiff should have been given. That point was not, however, presented in the trial court by motion or otherwise. It cannot be raised here for the first time. (Ill. Terminal R. R. Co. v. Thompson, 210 Ill. 226; Commonwealth Electric Co. v. Rooney, 138 Ill. App. 275; Huff v. C.C.C. & St. L. Ry. Co., 138 Ill. App. 89.) However, plaintiff's point has been given due consideration in weighing the evidence.

Plaintiff contends that defendants under the circumstances appearing in the record are estopped to set up the foregoing defense. Plaintiff cites Niblack v. Farley, 286 Ill. 536, a case where a note was given to deceive the bank examiners and which is clearly distinguishable upon that ground; Horwich v. Davis, 220 Ill. App. 40, where the court held that a note given to the bank merely to be shown as assets was no defense as against a suit on the note by a receiver of the bank; and First State Bank v. Holsen, 245 Ill. App. 75, where a similar defense was sought to be interposed against the liquidator of a bank. None of these cases is determinative.

Plaintiff suggests that the evidence of defendants is incredible; that the National Bank of the Republic was not bound by any conversation in which Woodruff agreed to do things utterly ultra vires any bank to do, and contends that the only evidence tending to show such authority is alleged statements of Woodruff. His au-

accommodation. It is quite impossible to discuss in detail all the evidence of the witnesses on this point. The probabilities and improbabilities of the testimony of the witnesses has been discussed at length in voluminous briefs. Every minute circumstance tending to corroborate the testimony on one side or the other has been called to our attention, including affidavits filed by defendants in support of their motion to set aside the judgment by confession, which plaintiff contends is so contradictory of the evidence given at the hearing as to constitute a variance on account of which an instruction for plaintiff should have been given. That point was not, however, presented in the trial court by motion or otherwise. It cannot be raised here for the first time. (Ill. Central R. R. Co. v. Thompson, 210 Ill. 526; Commonwealth Electric Co. v. Mooney, 138 Ill. App. 272; Hull v. C. C. C. & St. L. Ry. Co., 138 Ill. App. 39.) However, plaintiff's point has been given due consideration in weighing the evidence.

Plaintiff contends that defendants under the circumstances appearing in the record are estopped to set up the foregoing defense. Plaintiff cites Bibles v. Bailey, 28 Ill. 339, a case where a note was given to deceive the bank examiners and which is clearly distinguishable upon that ground; Hotchkiss v. Davis, 220 Ill. App. 40, where the court held that a note given to the bank merely to be known as assets was no defense as against a suit on the note by a receiver of the bank; and First State Bank v. Hansen, 243 Ill. App. 73, where a similar defense was held to be interposed against the liquidator of a bank. None of these cases is determinative.

Plaintiff suggests that the evidence of defendants is incredible; that the national bank of the republic was not bound by any conversation in which Woodruff agreed to do things utterly ultra vires any bank to do, and contends that the only evidence tending to show such authority is alleged statements of Woodruff. His ex-

thority, say they, cannot be proved by his own declarations.

Plaintiff also says that the defense assumes an agreement of the National Bank of the Republic to invest in the stock of the new bank, and that this is an error of fact. We are not convinced of this. There were many methods by which the National Bank of the Republic could bring about the results desired without itself taking title to the stock of the new bank. Plaintiff's argument that defendants are estopped is based on the theory that the note was given to be used in deceiving the bank examiners. Defendants disavow this theory, saying on the contrary that they did not expect Woodruff to deceive the examiners or anybody else. Defendants point to Wieboldt's testimony to the effect that Woodruff said he wanted the note because he thought it would be improper for the bank to lend the money to him and his associates until the directors could be got together, and that a possible emergency might arise before he could assemble the directors. However, assuming the note was given to deceive the bank examiners, it would not follow that defendants are estopped as against plaintiff, who was not deceived. As defendants point out, if A gives his note to B to deceive the bank examiners, it does not follow that B could not only use the note to deceive the examiners but also collect from A in behalf of B the amount for which the note was given. (Cochran v. Bowersox, 188 Ill. App. 157.)

A different principle obtains where the suit is by a receiver of the bank, who stands in the shoes of creditors. We think defendants are not estopped from interposing this defense.

Section 16 of the Negotiable Instrument Act provides:

"Every contract on a negotiable instrument is incomplete and revocable, until delivery of the instrument for the purpose of giving effect thereto. As between immediate parties, and as regards a remote party, other than a holder in due course, the delivery in order to be effectual must be made either by or under the authority of the party making *** and in such case the delivery may be shown to have been conditional or for a special purpose

thority, say they, cannot be proved by his own declarations.

Plaintiff also says that the defense assumes an agreement of the National Bank of the Republic to invest in the stock of the new bank, and that this is a mirror of fact. We are not convinced of this. There are many methods by which the National Bank of the Republic could bring about the results desired without itself taking title to the stock of the new bank. Plaintiff's argument that defendants are estopped is based on the theory that the note was given to be used in deceiving the bank examiners. Defendants disavow this theory, saying on the contrary that they did not expect Woodruff to deceive the examiners or anybody else. Defendants point to Tiebolt's testimony to the effect that Woodruff said he wanted the note because he thought it would be improper for the bank to lend the money to his and his associates until the directors could be got together, and that a possible emergency might arise before he could procure the directors. However, assuming the note was given to deceive the bank examiners, it would not follow that defendants are estopped as against plaintiff, who was not deceived. As defendants point out, if A gives his note to B to deceive the bank examiners, it does not follow that B could not only use the note to deceive the examiners but also collect from A in behalf of B the amount for which the note was given. (Porter v. Bowers, 188 Ill. App. 187.)

A different principle obtains where the suit is by a receiver of the bank, who stands in the shoes of creditors. We think defendants are not estopped from interposing their defense.

Section 15 of the Negotiable Instrument Act provides:

"Every contract on a negotiable instrument is incomplete and revocable, until delivery of the instrument for the purpose of giving effect thereto. As between immediate parties, and as regards a remote party, other than a holder in due course, the delivery in order to be effectual must be made either by, or under the authority of the party making the* and in such case the delivery may be shown to have been conditional or for a special purpose

only, and not for the purpose of transferring the property in the instrument. * * * And where the instrument is no longer in the possession of a party whose signature appears thereon, a valid and intentional delivery by him is presumed until the contrary is proved." (Ill. State Bar Stats., 1937, chap. 98, par. 36, sec. 16, p. 2130.)

Defendants cite cases construing this section of the statute. (Straus v. Citizens State Bank, 164 Ill. App. 420; the same case in 254 Ill. 185; Schmidt v. Schmidt, 253 Ill. App., 514; First National Bank v. Trott, 236 Ill. App. 412; McComb v. Meade, 256 Ill. App. 128.) Plaintiff says that these cases are not applicable because in each of them (unlike this case) there was an absence of consideration. Plaintiff says defendants failed to distinguish between an incomplete delivery upon no consideration and a completed delivery upon consideration. The distinction is vital and controlling. First National Bank v. Wolf, 208 Ill.App. 283; Farmers Bank v. Parr, 234 Ill. App. 78. Plaintiff argues that there was consideration here, first, in that the National Bank of the Republic parted with $1,000,000, and second, that the new bank was organized with this money. This, it is said, was an advantage to each defendant since the new bank assumed the liabilities of the old, thus relieving the defendants, directors and stockholders of the old bank, from their liability. The rescue of the old bank, says plaintiff, was a sufficient consideration for the note, citing Farmers Nat'l Bank v. Rosenkrans, 240 Ill. App. 230, and similar cases. The assertion that the note was delivered for a valid consideration assumes the circumstances in the making and delivery of the note to be as stated by witnesses for plaintiff. If we accept as true the testimony of Wieboldt, Fleming and other witnesses for defendants, the note was delivered for a special purpose, the delivery of which was conditional and for the accommodation of Woodruff and the National Bank of the Republic. It is one of the essentials of accommodation paper that it is made and delivered without consideration. There was an issue of fact under the

only, and not for the purpose of transferring the property in the instrument. . . . And where the instrument is no longer in the possession of a party whose signature appears thereon, a valid and intentional delivery by him is presumed until the contrary is proved." (11, Estate Law Cases, 1927, cmpn. 99, par. 57, sec. 16, p. 210.)

Defendants also cite cases concerning this position of the estate. (Stevens v. Stevens Estate Case, 168 Ill. App. 440; the same case in 254 Ill. 185; Moulton v. Crandall, 242 Ill. App., 214; First National Bank v. Pratt, 236 Ill. App. 414; Brown v. Brown, 256 Ill. App. 129.) Plaintiff says that these cases are not applicable because in each of them (unlike this case) there was an absence of consideration. Plaintiff says defendants failed to distinguish between an incomplete delivery upon no consideration and a completed delivery upon consideration. The distinction is vital and controlling. First National Bank v. Pratt, 236 Ill. App. 283; Kuykendall v. Pratt, 254 Ill. App. 72. Plaintiff argues that there was consideration here, first, in that the National Bank of the Republic parted with $1,000.00, and second, that the new bank was organized with this money. This, it is said, was an advantage to each defendant since the new bank assumed the liabilities of the old, thus relieving the defendants, directors and stockholders of the old bank, from their liability. The issue of the old bank, says plaintiff, was a sufficient consideration for the note, citing Farmers Bank v. Beardstown, 201 Ill. App. 270, and similar cases. The assertion that the note was delivered for a valid consideration assumes the circumstances in the making and delivery of the note to be as stated by witnesses for plaintiff. If we accept as true the testimony of Hewlett, Fleming and other witnesses for defendants, the note was delivered for a special purpose, the delivery of which was conditional and for the accommodation of Woodruff and the National Bank of the Republic. It is one of the essentials of accommodation paper that it is made and delivered without consideration. There was an issue of fact under the

leadings as to whether the note was delivered for a valuable consideration. The jury has decided that issue in favor of defendants, and the trial Judge, who saw and heard the witnesses, has approved the verdict. We cannot, on this record, say that the verdict of the jury is against the manifest weight of the evidence. The guaranty fund which was subscribed by these directors, according to their testimony, was the consideration given by them for the organization of the new bank, and its assumption of the debts of the old. That they so understood the result of the conferences with Woodruff and other representatives, is, we think, clearly established by a preponderance of all the evidence. They assumed that upon their subscription to the guaranty fund the plan for a new bank, as stated by Woodruff, was provided for in so far as they were concerned. This guaranty was given upon the assurance that Woodruff and the parties he represented would cause the new bank to be organized, and that it would assume the liabilities of the old bank. The obligation was on Woodruff to organize the new bank and it was necessary to that end that the stock should be subscribed for. The $1,000,000 necessary for the organization of the new bank was not to be provided by defendants but by the parties represented by Woodruff, who spoke for the National Bank of the Republic and its affiliated corporations. Under the agreement, when defendants subscribed for the guaranty fund they gave the consideration which entitled them to the organization of a new bank with a capital stock of $1,000,000, which would take over the liabilities of the old bank. Defendants had, therefore, prior to the execution of the note, by signing and delivering the guaranty, paid the full consideration which entitled them to have the new bank organized and to have it assume the debts of the old bank. Having paid for the rescue of the old bank once, defendants were not obligated to pay for it twice. All the circumstances surrounding the transaction on the early morning of July 10 indicate

pleadings as to whether the note was delivered for a valuable consideration. The jury has decided that issue in favor of defendants, and the trial Judge, who saw and heard the witnesses, has approved the verdict. We cannot, on this record, say that the verdict of the jury is against the manifest weight of the evidence. The guaranty fund which was subscribed by these directors, according to their testimony, was the consideration given by them for the organization of the new bank, and its assumption of the debts of the old. That they so understood the result of the conferences with Woodruff and other representatives, is, we think, clearly established by a preponderance of all the evidence. They assumed that upon their subscription to the guaranty fund the plan for a new bank, as stated by Woodruff, was provided for in so far as they were concerned. This guaranty was given upon the assurance that Woodruff and the parties he represented would cause the new bank to be organized, and that it would assume the liabilities of the old bank. The obligation was on Woodruff to organize the new bank and it was necessary to that end that the stock should be subscribed for. The $1,000,000 necessary for the organization of the new bank was not to be provided by defendants but by the parties represented by Woodruff, who spoke for the National Bank of the Republic and its affiliated corporations.

Under the agreement, when defendants subscribed for the guaranty fund they gave the consideration which entitled them to the organization of a new bank with a capital stock of $1,000,000, which would take over the liabilities of the old bank. Defendants had, therefore, prior to the execution of the note, by signing and delivering the guaranty, paid the full consideration which entitles them to have the new bank organized and to have it assume the debts of the old bank. Having paid for the rescue of the old bank once, defendants were not obligated to pay for it twice. All the circumstances surrounding the transaction on the early morning of July 10 indicate

that this was the understanding of all the parties to the transaction. The jury, therefore, could reasonably find that the execution of the note subsequently was for the accommodation of those upon whom rested the duty to organize the new bank and cause it to assume the liabilities of the old bank.

Plaintiff says that the affidavits of some of the defendants (Wieboldt, Glanz and Carlsen in particular) filed in support of the motion to open up the judgment by confessionwere inconsistent with their testimony. It may be admitted that there were verbal inconsistencies but all these matters were presented to the jurors and presumably were taken into consideration by them. We hold that under the evidence submitted by plaintiff it was proper to hear parol evidence to determine the conditions upon which the note was delivered to Woodruff. Handley v. Drum, 237 Ill. App. 587, is not applicable.

Complaint is made of procedural errors, in particular the conduct of the attorney for defendants in continually interjecting remarks tending to discredit witnesses for plaintiff and arouse prejudice against them. There is some ground for this criticism. As is usual, however, all the fault was not on any one side. The attorneys for the parties were active, vigilant and able, entirely capable of taking care of the interest of their clients. The record shows that no point was overlooked or neglected. We realize the case is important. We have given the voluminous record much consideration. Upon the whole record we are satisfied that in the last analysis the controlling issues are those of fact. We think another jury would return a similar verdict.

The judgment is affirmed.

AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

that this was the understanding of all the parties to the transaction. The jury, however, could reasonably find that the execution of the note subsequently was for the accommodation of those upon whom rested the duty to renew the new bank and cause it to assume the liabilities of the old bank.

Plaintiff made that the affidavits of some of the defendants (Wiebold, Claus and Carsen in particular) filed in support of the motion to open up the judgment by confession were inconsistent with their testimony. It may be admitted that there were verbal inconsistencies but all these matters were presented to the jurors and presumably were taken into consideration by them. We hold that under the evidence admitted by plaintiff it was proper to use parol evidence to determine the conditions upon which the note was delivered to Goodnutt. Smith v. Ryan, 287 Ill. App. 307, is not applicable.

Complaint is made of procedural errors, in particular the conduct of the attorney for defendants in continually interpreting remarks tending to discredit witnesses for plaintiff and arouse prejudice against them. There is some ground for this criticism. As is usual, however, all the trial was not on any one side. The attorneys for the parties were active, vigilant and able, entirely capable of taking care of the interest of their clients. The record shows that no point was overlooked or neglected. We realize the case is important. We have given the pleadings much consideration. Upon the single ground we are satisfied that in its last analysis the controlling issues are more of fact. We think another jury would return a similar verdict.

The judgment is affirmed.

AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

40040

JOHN EMERSON,
Appellant,

vs.

GUY A. RICHARDSON et al.,
Receivers, etc.,
Appellees.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

36A

296 I.A. 643

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In an action at law for personal injuries sustained by plaintiff who was struck by one of defendant's cars, the court, at the close of all the evidence, on motion of defendants instructed the jury to return a verdict in defendants' favor and motions for a new trial and in arrest being overruled, judgment was entered on the verdict, from which plaintiff appeals.

The accident occurred August 2, 1936, in Chicago, at the intersection of Fullerton avenue and Tripp street. Fullerton avenue extends east and west and is occupied by two street railway tracks. West bound cars ran over the north track and east bound over the south track. Tripp street extends north and south, intersecting Fullerton avenue.

The accident occurred at about 8 o'clock p. m. Upon the trial plaintiff testified to the occurrence, and there was only one other occurrence witness. The evidence shows that plaintiff was a bachelor, 63 years of age, who lived with his sister, Hilda Mallette, at 3456 Elston avenue; he was in good health and had been employed for a number of years; at this particular time he was out of employment. On the evening in question he left his home to go to a grocery store at the southeast corner of the intersection of Tripp street and Fullerton avenue; he was entirely familiar with the neighborhood; he says he walked east on Fullerton avenue to Tripp street; it was still daylight. As he came to the intersection he saw a street car

JOHN BURNS,
Appellant,

vs.

GUY A. RICHARDSON et al.,
Receivers, etc.,
Respondents.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

29G I.A. 643

MR. JUSTICE MCGOORTY DELIVERED THE OPINION OF THE COURT.

In an action at law for personal injuries sustained by plaintiff who was struck by one of defendants' cars, the court, at the close of all the evidence, on motion of defendants instructed the jury to return a verdict in defendants' favor and motions for a new trial and in arrest being overruled, judgment was entered on the verdict, from which plaintiff appeals.

The accident occurred August 3, 1910, in Chicago, at the intersection of Ashland avenue and Irving street. Ashland avenue extends east and west and is occupied by the street railway tracks. West bound cars run over the north track and east bound over the south track. Irving street extends north and south, intersecting Ashland avenue.

The accident occurred at about 8 o'clock p. m. Upon the trial plaintiff testified to the occurrence, and there was only one other occurrence witness. The evidence shows that plaintiff was a bachelor, 60 years of age, who lived with his sister, Nora Sullivan, at 3410 Ashland avenue; he was in good health and had been employed for a number of years; at this particular time he was out of employment. On the evening in question he left his home to go to a grocery store at the southeast corner of the intersection of Irving street and Ashland avenue; he was entirely familiar with the neighborhood; he says he walked east on Ashland avenue to Irving street; it was still daylight. As he came to the intersection he saw a street car

coming west about 150 feet distant. Plaintiff does not remember whether the lights on the street car were burning, but recalls that the lights in the streets were. He walked on the north side of Fullerton avenue from Lowell avenue to Tripp street; there were no automobiles, trucks or street cars in the stree with the exception of the west bound car which he saw; he had crossed Fullerton avenue many times; there was a safety island on the east side of Tripp street. In response to questions plaintiff said that he walked out to the curb line before he stepped down on the street, and that when he reached the curb line the street car was about 75 feet away and was going pretty fast; he had to walk "kitty-corner" to get across the street; plaintiff had a gallon crockery jug in his right hand; he was going to the store to get some vinegar; he did not carry anything other than the jug; plaintiff describes his journey across the street as follows: "I walked across Tripp avenue and over at the corner there - and - I looked back again and I seen - Well, about 75 feet away the car was coming; so I started to cross over, but when I got to the track they got me and that is all I know." He says he could not see how fast the car was going but thinks it was going pretty fast.

Frank Museil, a witness for plaintiff, testified that at the time in question he was driving a Ford V-8 pickup truck westward in Fullerton avenue; that he caught up with the street car at Crawford avenue; that it was about four blocks from Crawford to Tripp, and that he traveled right behind the street car in a westerly direction. The street car did not stop between Crawford avenue and the place of the accident. Museil says he was traveling about 25 miles an hour, and he believes the street car was going about 30 miles an hour - between 25 and 30; he says that he saw the accident and describes it as follows: "Well, I seen a fellow and a street car, you know, try to pass the safety island in the street. Now,

coming west about 150 feet distant. Plaintiff does not remember whether the lights on the street car were burning, but recalls that the lights in the streets were. He walked on the north side of Fulleton avenue from Lowell avenue to Tripp street; there were no automobiles, trucks or street cars in the street with the exception of the west bound car which he saw; he had crossed Fulleton avenue many times; there was a safety island on the east side of Tripp street. In response to questions plaintiff said that he walked out to the curb line before he stepped down on the street, and that when he reached the curb line the street car was about 75 feet away and was going pretty fast; he had to walk "sixty-miner" to get across the street; plaintiff had a gallon crockery jug in his right hand; he was going to the store to get some vinegar; he did not carry anything other than the jug; plaintiff describes his journey across the street as follows: "I walked across Tripp avenue and over at the corner there - and - I looked back again and I again - well, about 75 feet away the car was coming; so I started to cross over, but when I got to the track they got me and that is all I know." He says he could not see how fast the car was going but thinks it was going pretty fast.

Frank Lunell, a witness for plaintiff, testified that at the time in question he was driving a Ford V-8 pickup truck west-ward in Fulleton avenue; that he caught up with the street car at Crawford avenue; that it was about four blocks from Crawford to Tripp, and that he travelled right behind the street car in a westerly direction. The street car did not stop between Crawford avenue and the place of the accident. Lunell says he was travelling about 35 miles an hour, and he believes the street car was going about 30 miles an hour - between 25 and 30; he says that he saw the accident and describes it as follows: "Well, I seen a fellow and a street car, you know, try to pass the safety island in the street. Now,

I seen the man come from the street car and jump over about three feet and drop down again in the tracks. After the accident the street car stopped at the other side of Tripp avenue and had almost crossed Tripp. The man who was hurt was put in my truck and the conductor of the street car went along with me to the Belmont hospital." On cross-examination Museil said that the first thing he saw of the accident was a man falling.

The controlling question in the case is whether the court erred in directing a verdict for defendants. The law applicable to such a motion made at the close of all the evidence has been declared so often that it will be necessary to cite only a few of the cases in which the rule has been announced. As was said in Kelly v. Chicago City Railway, 283 Ill. 640:

> "If there was any evidence in the record from which, standing alone, the jury might without acting unreasonable in the eyes of the law, have found the material avernments of the declaration to have been sustained, the motion was properly denied and the instruction refused."

(See also Provenzano v. Illinois Central Railroad Company, 357 Ill. 192, and Thomason v. Chicago Motor Coach Co., 292 Ill. App. 104.)

A material element of plaintiff's cause of action was that he should have been at the time of and just prior to the injury in the exercise of due care for his own safety. If we assume that under the evidence there was a question for the jury as to the negligence of defendant in the speed at which it was driving its cars, this would not be sufficient to justify submitting the case to the jury unless there was also evidence from which a jury could reasonably find that plaintiff was in the exercise of due care. (Newell v. C. C. C. & St. L. Ry. Co., 261 Ill. 505.) The plaintiff relies very much on Loftus v. Chicago Rys. Company, 293 Ill. 475. While in many respects that case is upon the facts similar to this, in other material matters it is distinguishable. In the Loftus case

I seen the man come from the street car and jump over about three feet and drop down again in the tracks. After the accident the street car stopped at the other side of Tripp avenue and had almost crossed Tripp. The man who was hurt was put in my truck and the conductor of the street car went along with me to the Lakeout hospital." On cross-examination Ansell said that the first thing he saw of the accident was a man falling.

The controlling question in the case is whether the court erred in directing a verdict for defendants. The law applicable to such a motion made at the close of all the evidence has been declared so often that it will be necessary to cite only a few of the cases in which the rule has been announced. As was said in Reilly v. Chicago City Railway, 283 Ill. 640:

> "If there was any evidence in the record tending, standing alone, the jury might without acting unreasonable in the eyes of the law, have found the material averments of the declaration to have been sustained, the motion was properly denied and the instruction refused."

(See also Grovenburg v. Illinois Central Railroad Company, 357 Ill. 192, and Freeman v. Chicago Motor Coach Co., 364 Ill. App. 104.)

A material element of plaintiff's cause of action was that he should have been at the time of and just prior to the injury in the exercise of due care for his own safety. If we assume that under the evidence there was a question for the jury as to the negligence of defendant in the speed at which it was driving its car, this would not be sufficient to justify submitting the case to the jury unless there was also evidence from which a jury could reasonably find that plaintiff was in the exercise of due care. (Ansell v. C. C. C. & St. L. Ry. Co., 201 Ill. 508.) The plaintiff relies very much on Loftus v. Chicago Rys. Company, 343 Ill. 475. While in many respects that case is upon its facts similar to this, in other material respects it is distinguishable. In the Loftus case

it appeared that when plaintiff's intestate was three or four feet from the tracks he looked in the direction from which the street car was approaching and about 50 feet to the west saw a group of persons waiting to board the street car at a place where it usually stopped to receive passengers. The car slowed down as it approached this place, and then suddenly increased its speed without stopping. Under those circumstances it was held that it was a question for the jury as to whether the deceased was guilty of contributory negligence in attempting to cross the track. There are no such circumstances here, nor any circumstance which indicate that plaintiff used any degree of care whatever as he approached the track which he was about to cross and on which the street car struck him.

In Kelly v. Chicago City Railway Co., 283 Ill. 640, the Supreme court said:

"As a general proposition, the question of contributory negligence is one of fact for the jury under all the facts and circumstances shown by the evidence, (Bale v. Chicago Junction Railway Co., 259 Ill. 476) but cases occasionally arise in which a person is so careless or his conduct so violative of all rational standards of conduct applicable to persons in a like situation that the court can say, as a matter of law, that no rational person would have acted as he did and render judgment for the defendant."

We hold as a matter of law the plaintiff here was guilty of negligence, and that this precludes recovery. The trial court was justified in directing the jury to return a verdict for the defendant.

The judgment is affirmed.

AFFIRMED.

McSurely, P.J., and O'Connor, J., concur.

it appeared that when plaintiff's intestate was three or four feet from the tracks he looked in the direction from which the street car was approaching and about 50 feet to the east saw a group of persons waiting to board the street car at a place where it usually stopped to receive passengers. The car slowed down as it approached this place, and then suddenly increased its speed without stopping. Under these circumstances it was held that it was a question for the jury as to whether the deceased was guilty of contributory negligence in attempting to cross the track. There are no such circumstances here, nor any circumstance which indicate that plaintiff used any degree of care whatever as he approached the track which he was about to cross and on which the street car struck him.

In Kelly v. Union & City Railway Co., 285 Ill. 340, the Supreme court said:

"As a general proposition, the question of contributory negligence is one of fact for the jury under all the facts and circumstances shown by the evidence. (Hale v. Illinois Central Railway Co., 285 Ill. 472) but cases occasionally arise in which a person is so careless or his conduct so violative of all rational standards of conduct applicable to persons in a like situation that the court can say, as a matter of law, that no rational person would have acted as he did and render judgment for the defendant."

We hold as a matter of law the plaintiff here was guilty of negligence, and that this precludes recovery. The trial court was justified in directing the jury to return a verdict for the defendant.

The judgment is affirmed.

AFFIRMED.

Kostrzewa and O'Connor, J., concur.

P.J.

40064

CLEANERS DeLUXE, a Corporation,
Appellant,

vs.

WILLIAM JUERN et al.,
Appellees.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

296 I.A. 643

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by plaintiff respondent from an order entered December 16, 1937, striking its answers to certain petitions of defendant and granting the prayer of defendants for the correction of error of fact coram nobis under section 72 of the Civil Practice Act. The facts appear to be that Cleaners DeLuxe sued William Juern and his son Gilbert, before a Justice of the Peace, and obtained judgment by default for $400 on July 25, 1929; that William Juern perfected an appeal to the Circuit court; that plaintiff filed its appearance in that court November 20, 1931; that the appeal was assigned to the trial calendar of Judge Caverly; that in conformity with section 8 of Rule 23 of the Circuit court, providing that if any cause had not been noticed for trial within two years from the time of its commencement or from the date of the last order therein, it should be deemed stricken from the docket; upon order of the Executive Committee the clerk of the court inspected its docket and made an entry thereon to the effect that the cause was "stricken off pursuant to Rule 23, section 8"; that section 9 of the same rule provides that a cause thus stricken may not be reinstated by plaintiff without a showing in open court after a notice to the opposite party, but that upon motion of defendant it may be reinstated and shall without further notice be placed on the trial calendar; that "in such case, unless the plaintiff or complainant gives notice to the defendant of his intention to try the case

CLEARERS DELUXE, a corporation,
Appellant,

vs.

WILLIAM DUNN et al.,
Appellees.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

29641.A.643

MR. JUSTICE DAUGHERTY DELIVERED THE OPINION OF THE COURT.

This is an appeal by plaintiff respondent from an order entered December 16, 1927, striking its answers to certain petitions of defendant and granting the prayer of defendants for the correction of error of fact coram nobis under section 72 of the Civil Practice Act. The facts appear to be that clearers Deluxe and William Dunn and his son Gilbert, before a Justice of the Peace, had obtained judgment by default for $46 on July 18, 1928; that William Dunn prosecuted an appeal to the circuit court; that plaintiff filed its appearance in that court November 20, 1931; that the appeal was assigned to the trial calendar of Judge Gaverly; that in conformity with section 8 of Rule 23 of the circuit court, providing that if any cause had not been noticed for trial within two years from the time of its commencement or from the date of the last order therein, it should be deemed stricken from the docket; upon order of the executive Committee the clerk of the court inspected its docket and made an entry thereon to the effect that the cause was "stricken off pursuant to Rule 23, section 8"; that section 9 of the same rule provides that a cause thus stricken may not be reinstated by plaintiff without a showing in open court after a notice to the opposite party, but that upon motion of defendant it may be reinstated and shall without further notice be placed on the trial calendar; that "in such case, unless the plaintiff or complainant gives notice to the defendant of his intention to try the case

within ten days after such reinstatement the defendant shall not be required to prepare for trial and the cause, when called for trial, shall be dismissed for want of prosecution;" that Rule 24 of the Circuit court provided that the Executive Committee should from time to time make orders as it deemed advisable for the purpose of calling for trial and disposing of all pending cases stricken from the docket in accordance with section 8 of Rule 23; that after this cause was assigned to Judge Caverly in September, 1932, no further order was entered by the Executive Committee for the purpose of calling the cause for trial. However, the clerk of the court made up a calendar of such cases, including this one, and Judge Hood, sitting in the Circuit court, at the request of its judges called a large number of these cases, including this one, on May 12, 1933, and dismissed the same.

October 23, 1933, the Executive Committee of the Circuit court entered an order reciting that by inadvertence no order had been entered by it providing for the calling of cases stricken from the docket and by an order which was entered nunc pro tunc as of April 17, 1933, directed such calendar to be made up. This order defendant alleges was wholly null and void for the reason that such a nunc pro tunc order is proper only where an order formerly entered does not appear of record by reason of some fault or oversight of the clerk.

Defendant's petition alleges that "the action of Judge Hood in calling the above entitled appeal case for trial was wholly unjustified and unwarranted by the rules of this court; that said case had not been assigned to him, but had been assigned to Judge Caverly; that it had been stricken from the docket, and that no motion had been made by either party litigant for its restoration upon the docket; that no trial notice had ever at any time been served by either litigant upon the other, and filed in the office of the clerk;

within ten days after such reinstatement the defendant shall not be required to prepare for trial and the cause, when called for trial, shall be dismissed for want of prosecution;" that Rule 24 of the Circuit court provided that the Executive Committee should from time to time make orders as it deemed advisable for the purpose of calling for trial and disposing of all pending cases stricken from the docket in accordance with section 8 of Rule 23; that after this cause was assigned to Judge Cavarly in September, 1932, no further order was entered by the Executive Committee for the purpose of calling the cause for trial. However, the clerk of the court made up a calendar of such cases, including this one, and Judge Good, sitting in the Circuit court, at the request of its judges called a large number of these cases, including this one, on May 19, 1933, and dismissed the same.

October 23, 1933, the Executive Committee of the Circuit court entered an order recited that by inadvertence no order had been entered by it providing for the calling of cases stricken from the docket and by an order which was entered nunc pro tunc as of April 17, 1933, directed such calendar to be made up. This order defendant alleges was wholly null and void for the reason that such a nunc pro tunc order is proper only where an order formerly entered does not appear of record by reason of some fault or oversight of the clerk.

Defendant's petition alleges that "the action of Judge Good in calling the above entitled appeal case for trial was wholly unjustified and unauthorized by the rules of this court; that said case had not been assigned to him, but had been assigned to Judge Cavarly; that it had been stricken from the docket, and that no motion had been made by either party litigant for its restoration upon the docket; that no trial notice had ever at any time been served by either litigant upon the other, and filed in the office of the clerk;

in accordance with sections 1 to 7 of Rule 23, and that no order had been entered by the Executive Committee in accordance with Rule 24 of this court, providing for the assigning of said cause to Judge Hood and the calling of the same for trial."

Plaintiff was not in court before Judge Hood on May 12, 1933, and did not respond when the case was called. ~~His~~ Defendants' representative was in court on that day, but in attempting to answer a number of calls of other cases, happened to be out at the moment when this appeal was called and he was not able upon inquiry to ascertain from the clerk what ~~motions~~ Cases had been disposed of or what orders entered. On the next day he caused the Chicago Daily Law Bulletin to be checked and there under appropriate heading found this entry: "Following cases previously stricken from docket were dismissed no costs for want of prosecution," and beneath this heading appeared the title of this case. Thereafter the docket of the court was checked in behalf of defendant and disclosed this entry: "May 12, 1933, Order Ct. Suit dism. w. p. costs pd. R. 510." Relying on the statement appearing in the Law Bulletin and on this entry in the docket, defendant did not know until February, 1936, 7 that it was being contended that instead of dismissing the suit Judge Hood had dismissed the appeal with <u>procedendo</u>, thus, as contended, affirming the judgment of the Justice of the Peace. When defendant heard of this contention he caused the file jacket of the appeal to be examined and found that an entry had been made thereon as follows: "Judge Hood. May 12, 1933. Ord. Ct. Suit Dism. w. p. Costs pd. R. 510," but that later some person unknown, with pen and ink, had crossed out the word "suit" and written in lieu thereof the word "appl." and added thereto the words "with procedendo" with the result that instead of the suit being dismissed it appeared the appeal was dismissed. Examination of the Record Book 510 disclosed no order applicable to the case. Thereupon defendant filed his pe-

in accordance with sections 1 to 7 of Rule 53, and that no order had been entered by the Executive Committee in accordance with Rule 24 of this court, providing for the assigning of said cause to Judge Hood and the setting of the case for trial."

Plaintiff was not in court before Judge Hood on May 12, 1933, and did not respond when the case was called. A representative was in court on that day, but in attempting to answer a number of calls of other cases, happened to be out at the moment when this appeal was called and he was not able upon inquiry to ascertain from the clerk what motions had been disposed of or what orders entered. On the next day he obtained the docket daily law Bulletin to be checked and there under appropriate heading found this entry: "Following cases previously stricken from docket were dismissed no costs for want of prosecution," and between this heading appeared the title of this case. Thereafter the docket of the court was checked in behalf of defendant and disclosed this entry: "May 12, 1933, Order ct. Suit dism. w. p. costs pd. R. Rio." Relying on the statement appearing in the Law Bulletin and on this entry in the docket, defendant did not know until February, 1934, that it was being contended that instead of dismissing the suit Judge Hood had dismissed the appeal with proceedings, thus, as contended, affirming the judgment of the Justice of the Peace. When defendant heard of this contention he caused the file docket of the appeal to be examined and found that an entry had been made thereon as follows: "Judge Hood. May 12, 1933. Ord. Ct. Suit dism. w. p. Costs pd. R. Rio," but that later some person unknown, with pen and ink, had crossed out the word "suit" and written in lieu thereof the word "appl." and added thereto the words "with proceedings" with the result that instead of the suit being dismissed it appeared the appeal was dismissed. Examination of the Record book Rio disclosed no order applicable to the case. Thereupon defendant filed his p-

tition of October 22, 1937, praying for the reformation and restoration of the file jacket and the quashing of an execution issued on a transcript of the judgment from the Justice of the Peace, which transcript had been filed in the Circuit court, and a sale of real estate made thereunder should be vacated and set aside. Upon a hearing in court the minute book of Judge Hood was produced for the inspection of Judge Fisher, disclosing the dismisal of the appeal with procedendo and a reference to record book (not 510 but 515 at page 220) in which such an order was recorded. These facts appearing and on inspection of the record, the trial court allowed the correction of the record, set aside the order of dismissal of the appeal with procedendo and restored the appeal to the trial calendar.

Plaintiff contends that after term the court is without jurisdiction to vacate a judgment except upon motion under section 72 of the Civil Practice act; that such a motion is the commencement of a new suit; that only errors of fact in a proceeding may be corrected by this motion; that the motion must disclose some fact which was unknown to the court at the time judgment was rendered; that notations and memoranda of the clerk after judgment are not errors of fact which may be corrected by this motion; that an error on applying or interpreting the rules of the court is an error of law and not of fact, and that the motion cannot be used to correct an alleged error of law, and that will not be allowed to prevail where the moving party has been negligent, all of which, the many cases cited sustain. Plaintiff therefore says that the court was without jurisdiction to enter the order of December 16, 1937, because the petition was insufficient, because the alleged errors, if errors, were errors of law which could not be corrected by the motion, because the petition states no error of fact which was unknown to the court at the time of the entry of the judgment of May 12, 1933, which would have prevented the court from entering that judgment,

tition of October 24, 1927, praying for the reformation and restoration of the file docket and the quashing of an execution issued on a transcript of the judgment from the justice of the peace, which transcript had been filed in the circuit court, and a sale of real estate made thereunder should be vacated and set aside. Upon a hearing in court the minute book of Judge Hood was produced for the inspection of Judge Slater, disclosing the dismissal of the appeal with prejudice and a reference to record book (not 310 but 315 at page 220) in which such an order was recorded. These facts appearing and on inspection of the record, the trial court allowed the correction of the record, set aside the order of dismissal of the appeal with prejudice and restored the appeal to the trial calendar.

Plaintiff contends that after term the court is without jurisdiction to vacate a judgment except upon motion under section 72 of the Civil Practice act; that such a motion is the commencement of a new suit; that only errors of fact in a proceeding may be corrected by this motion; that the motion must disclose some fact which was unknown to the court at the time judgment was rendered; that notations and memoranda of the clerk after judgment are not errors of fact which may be corrected by this motion; that an error on applying or interpreting the rules of the court is an error of law and not of fact, and that the motion cannot be used to correct an alleged error of law, and that will not be allowed to prevail where the moving party has been negligent, all of which, the many cases cited sustain. Plaintiff therefore says that the court was without jurisdiction to enter the order of December 10, 1927, because the petition was insufficient, because the alleged errors, if errors, were errors of law which could not be corrected by the motion, because the petition states no error of fact which was unknown to the court at the time of the entry of the judgment of May 19, 1923, which would have prevented the court from entering that judgment,

and further that defendant is precluded because he has not been diligent in the prosecution of his cause, and because he is guilty of negligence. Plaintiff further contends that the answers filed by plaintiff (defendant here) set up a sufficient defense to the motion.

We are not convinced by these suggestions. While the cases cited by plaintiff respondent accurately state the general rules of law, these rules are not controlling under facts such as are here disclosed. Plaintiff does not deny that defendants had a good defense to its action. The answers filed were general in nature and failed to specifically deny the specific facts which were alleged in the several petitions. They were properly stricken as being insufficient under sections 41, 42, 43 and 45 of the Civil Practice act, and would have been subject to be stricken under any modern system of pleading. (Cole v. Speer & Sons Co., 286 Ill. App. 578-582; Borker v. Bendix, 288 Ill. App. 260.) At any rate the court examined the record and plaintiff respondent was allowed to present his points. If error there was it was not reversible. (Central Cleaners & Dyers v. Schild, 284 Ill. App. 268.)

It is unnecessary to discuss all the points presented or review all the cases cited. In the absence of an order from the Executive Committee, Judge Hood was without authority to enter the order of May 12, 1933. It is quite true that a misconstruction of a rule of court by the court is an error of law which cannot be corrected by this motion. But the error here was not of that nature. Here the trial Judge was ignorant of the fact that no order had been entered putting this case on a trial calendar. If that fact had been known to him, no order would have been entered by him. It has been held in almost innumerable cases that an error such as this is one of fact which may be and will be corrected by this motion. Of the many cases it will be sufficient to cite Jacobson v. Ashkinaze,

and further that defendant is prejudiced because he has not been diligent in the prosecution of his cause, and because of the laches of negligence. Plaintiff further contends that the answers filed by plaintiff (defendant here) set up a sufficient defense to the motion.

We are not convinced by these suggestions. While the cases cited by plaintiff respondent accurately state the general rules of law, these rules are not controlling under facts such as are here disclosed. Plaintiff does not deny that defendants had a good defense to its action. The answers filed were general in nature and failed to specifically deny the specific facts which were alleged in the several positions. They were properly stricken as being insufficient under sections 41, 42, 43 and 44 of the civil Practice act, and could have been subject to be stricken under any modern system of pleading. (Cole v. Ebert & Cone Co., 258 Ill. App. 579-582; Forest v. Lewis, 258 Ill. App. 266.) At any rate the court examined the record and plaintiff respondent was allowed to present his points. If error there was it was not reversible. (Central Glassware & Dyers v. Gould, 254 Ill. App. 263.)

It is unnecessary to discuss all the points presented or review all the cases cited. In the absence of an order from the Executive Committee, Judge Hoos was without authority to enter the order of May 14, 1932. It is quite true that a misconstruction of a rule of court by the court is an error of law which cannot be corrected by this motion. But the error here was not of that nature. Here the trial judge was ignorant of the fact that no order had been entered putting this case on a trial calendar. If that fact had been shown to him, no order would have been entered by him. It has been held in almost innumerable cases that an error such as this is one of fact which may be and will be corrected by this motion. Of the many cases it will be sufficient to cite Jacobson v. Abbinnes,

337 Ill. 141, 148; Straus v. Biesen, 242 Ill. App. 370; Risedorf v. Fyfe, 250 Ill. App. 122, 126; Swieroz v. Nalepka, 259 Ill. App. 262; Heinsius v. Poehlmann, 282 Ill. App. 472, 477, 478; Maniatis v. Carelin, 287 Ill. App., 154, 159; Borman v. Raff, 290 Ill. App. 604; 8 N. E. 374; Stanke v. Atherton, 289 Ill. App. 614; 8 N.E. (2nd) 374; In re Estate of Bransfield, 292 Ill. App. 206.

The facts recited show petitioner was not negligent.

The judgment of the trial court is affirmed.

AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

327 III. 141, 146; Ottman v. Tiesen, 242 III. App. 370; Hingert v. Byte, 230 III. App. 128, 133; Weiner v. Halepke, 230 III. App. 302; Heinrich v. Poehlmann, 242 III. App. 471, 477, 478; Kamlein v. Gerelin, 237 III. App., 144, 150; Gorman v. Hoff, 230 III. App. 604; 8 R. E. 374; Hynes v. Atterton, 230 III. App. 614; 8 R.E. (2nd) 374; In re Estate of Kennefield, 232 III. App. 302.

The facts recited show petitioner was not negligent.

The judgment of the trial court is affirmed.

AFFIRMED.

McCurely, P. J., and O'Connor, J., concur.

39990

NAPOLIAN DeVERVILLE, a Minor, by his Father and Next Friend, NAPOLIAN DeVERVILLE, Sr.,
Appellee,

vs.

CITY OF CHICAGO, a Municipal Corporation,
Appellant.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

296 I.A. 644

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against defendant to recover damages for personal injuries claimed to have been sustained through the negligence of defendant in failing to use reasonable care to keep the roadway of South Sangamon street in a reasonably safe condition, as a result of which plaintiff was injured. There was a jury trial and a verdict and judgment in plaintiff's favor for $10,000 and defendant appeals.

The record discloses that about 9:30 or 10 o'clock on the night of September 18, 1935, plaintiff, about 18 years of age, was riding on a motorcycle south in Sangamon street between 65th and 66th streets in Chicago; that about a year and a half prior to that time the City had dug up a strip of the asphalt pavement in the process of installing a new fire plug at the west curb between those streets; the strip removed was about 2 feet wide and extended east from the west curb about 5 or 10 feet. After the plug was installed part of the roadway was filled up and the old slabs of asphalt placed on top, so that the filling was higher in the middle and lower at each side of the strip. Plaintiff was riding a motorcycle on which a companion 13 years of age was riding behind him, south in Sangamon street. He discovered the bump in the street and endeavored to avoid it by turning to the east, when the motorcycle collided with a northbound automobile, as a result of which

39990

NAPOLIAN DEVARVILLE, minor, by his father and next friend,
NAPOLIAN DEVARVILLE, &c.,
Appellee,

vs.

CITY OF CHICAGO, a municipal corporation,
Appellant.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

39611.A. 644

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against defendant to recover damages for personal injuries claimed to have been sustained through the negligence of defendant in failing to use reasonable care to keep the roadway of South Dearborn street in a reasonably safe condition, as a result of which plaintiff was injured. There was a jury trial and a verdict and judgment in plaintiff's favor for $10,000 and defendant appeals.

The record discloses that about 9:30 or 10 o'clock on the night of September 18, 1928, plaintiff, about 14 years of age, was riding on a motorcycle south in Dearborn street between 60th and 66th streets in Chicago; that about a year and a half prior to that time the City had dug up a strip of the asphalt pavement in the process of installing a new fire plug at the west curb between those streets; the strip removed was about 2 feet wide and extended east from the west curb about 5 or 10 feet. After the plug was installed part of the roadway was filled up and the old slabs of asphalt placed on top, so that the filling was higher in the middle and lower at each side of the strip. Plaintiff was riding a motorcycle on which a companion 13 years of age was riding behind him, south in Dearborn street. He discovered the bump in the street and endeavored to avoid it by turning to the east, when the motorcycle collided with a northbound automobile, as a result of which

plaintiff was injured and taken to a hospital where he remained for about two and one-half months.

Plaintiff's evidence was to the effect that at the time of the accident he was traveling from 15 to 20 miles an hour, while on the other side there was some testimony to the effect that the motorcycle was traveling from 40 to 45 miles an hour, and that the northbound automobile was traveling at about 20 miles an hour, it having started from the east curb in the same block a short distance south of where the collision occurred.

Defendant contends that plaintiff was guilty of such contributory negligence as to bar him from recovery, and that its motion at the close of all the evidence for a directed verdict should have been sustained. There is no contention made that defendant was not guilty of negligence in the maintenance of the roadway of the street at the place in question.

The evidence is to the effect that plaintiff, as he came south, stopped at the north side of 65th street to permit east and west traffic to pass; that he then started south, and counsel for defendant argues that plaintiff testified he looked back over his shoulder to talk to his companion a few moments before the accident, and that this conduct on the part of plaintiff was negligence which proximately brought about the collision of the motorcycle with the automobile. And defendant also argues that the evidence shows plaintiff did not keep a lookout, as he should have done, to see the condition of the street. In Puck v. City of Chicago, 281 Ill. App. 6, plaintiff sustained injuries by stumbling over an uneven place in the sidewalk. In passing on the question whether plaintiff should have seen the condition of the sidewalk and therefore have averted the injury, we said (p. 11): "Long ago our Supreme court held that a pedestrian upon a sidewalk may ordinarily assume that it is in a reasonably safe condition for travel, and is not

plaintiff was injured and taken to a hospital where he remained for about two and one-half months.

Plaintiff's evidence was to the effect that at the time of the accident he was traveling from 15 to 20 miles an hour, while on the other side there was some testimony to the effect that the motorcycle was traveling from 40 to 45 miles an hour, and that the northbound automobile was traveling at about 20 miles an hour, it having started from the east curb in the same block a short distance south of where the collision occurred.

Defendant contends that plaintiff was guilty of such contributory negligence as to bar his recovery, and that his motion at the close of all the evidence for a directed verdict should have been sustained. There is no contention that defendant was not guilty of negligence in the maintenance of the roadway of the street at the place in question.

The evidence is to the effect that plaintiff, as he came south, stopped at the north side of 63rd street to permit east and west traffic to pass; that he then started south, and continued for defendant argues that plaintiff testified he looked back over his shoulder to talk to his companion a few moments before the accident, and that this conduct on the part of plaintiff was negligence which proximately brought about the collision of the motorcycle with the automobile. And defendant also argues that the evidence shows plaintiff did not keep a lookout, as he should have done, to see the condition of the street. In Buck v. City of Chicago, 281 Ill. App. 6, plaintiff sustained injuries by stumbling over an uneven place in the sidewalk. In passing on the question whether plaintiff should have seen the condition of the sidewalk and therefore have averted the injury, we said (p. 11): "Long ago our Supreme Court held that a pedestrian upon a sidewalk may ordinarily assume that it is in a reasonably safe condition for travel, and is not

absolutely bound to keep his eyes constantly fixed on the sidewalk in search of possible holes or other defects. City of Chicago v. Babcock, 143 Ill. 358; Graham v. City of Chicago, 260 Ill. App. 590. In the Graham case we said (p. 594): 'A pedestrian is not obliged to keep his eyes glued to a sidewalk, but may assume that it is in a reasonably safe condition. City of Chicago v. Babcock, 143 Ill. 358.'" We think the same rule applies to one using the roadway of the street.

Plaintiff testified that shortly after he crossed 65th street he "looked back over my shoulder to him" (his companion) but did not turn around to talk to him; that he was looking ahead to see where he was going and to see "how the road was ahead" of him. While this might seem to be a little inconsistent in that plaintiff first said he looked back over his shoulder and later that he was looking ahead of him, we think the question whether defendant was guilty of contributory negligence was one for the jury. Louthan v. Chicago City Ry. Co., 198 Ill. App. 329; Kelly v. Chicago City Ry. Co., 283 Ill. 640.

The cases of Barton v. Van Gesen, 91 Wash. 94, and Shelton v. Union Traction Co., 99 Kans. 34, cited by counsel for defendant, are not in point.

The Barton case was an action to recover damages for personal injuries sustained by a boy riding on a bicycle which collided with an automobile. The jury found for defendant and the judgment was affirmed. The holding of the court is that the question of liability was for the jury. The Shelton case was an action for damages for personal injuries by the driver of an automobile which collided with a street car. The accident occurred about 8 o'clock in the morning. Plaintiff was driving his automobile east on the south side of Chestnut street; he observed two men walking north toward Chestnut street on the sidewalk; just as they were stepping off the curb into Chestnut street plaintiff sounded his horn to notify them

absolutely bound to keep his eyes constantly fixed on the sidewalk in search of possible holes or other defects. City of Chicago v. Babcock, 145 Ill. 358; Graves v. City of Chicago, 260 Ill. App. 590. In the Graves case we said (p. 594): 'A pedestrian is not obliged to keep his eyes fixed to a side walk, but may assume that it is in a reasonably safe condition. City of Chicago v. Babcock, 145 Ill. 358.' We think the same rule applies to one using the roadway of the street.

Plaintiff testified that shortly after he crossed 65th street he "looked back over my shoulder to him" (his companion) but did not turn around to talk to him; that he was looking ahead to see where he was going and to see "how the road was ahead" of him. While this might seem to be a little inconsistent in that plaintiff first said he looked back over his shoulder and later that he was looking ahead of him, we think the question whether defendant was guilty of contributory negligence was one for the jury. Bentken v. Chicago City Ry. Co., 193 Ill. App. 329; Kelly v. Chicago City Ry. Co., 283 Ill. 640.

The cases of Barton v. Van Geem, 91 Kans. 94, and Shelton v. Union Traction Co., 39 Kans. 34, cited by counsel for defendant, are not in point.

The Barton case was an action to recover damages for personal injuries sustained by a boy riding on a bicycle which collided with an automobile. The jury found for defendant and the judgment was affirmed. The holding of the court is that the question of liability was for the jury. The Shelton case was an action for damages for personal injuries by the driver of an automobile which collided with a street car. The accident occurred about 8 o'clock in the morning. Plaintiff was driving his automobile east on the south side of Chestnut street; he observed two men walking north toward Chestnut street on the sidewalk; just as they were stepping off the curb into Chestnut street plaintiff sounded his horn to notify them

of the presence of his automobile. Up to that time plaintiff had been driving at an "intermediate speed." He then threw his levers into high gear, waved his hand at one of the men he knew, and looked at the street car which was approaching from the south; he attempted to avoid the street car but it was too late. The court said, "The plaintiff had the same opportunity, and could have seen the street car had he looked." The action of the trial court in sustaining the demurrer to the evidence of plaintiff was upheld. We think the facts in that case were entirely dissimilar to the facts in the case before us.

The jury in the case at bar saw and observed the witnesses and their finding in favor of plaintiff was approved by the trial Judge. We are unable to say that the court erred in denying defendant's motion for a directed verdict; nor are we able to say that the finding in plaintiff's favor was against the manifest weight of the evidence.

Defendant further contends that the judgment is excessive. The evidence shows that plaintiff was taken immediately after the accident to Cook County hospital, where he was attended by Dr. Zeiss, who testified that he examined the patient and found a wound about 3 inches long "in the middle third - middle and upper third of the left tibia and fibula. He also had a fracture through both bones in that area.*** it was a compound fracture;" that he cut away all the dead tissue, muscle and skin, removed the dirt, put the leg in a cast and drove a Steinman pin through the heel bone, then applied the usual weights and pulleys to the leg, etc.; that he afterward removed the pin and the leg was encased in a plaster cast; that the patient was at the hospital for 10 or 12 weeks; that at the time of the trial (about 18 months after the accident) he again examined plaintiff and found there was an "elevation of the tibia in the middle third of the left leg. It is abnormal;" that there was ap-

of the presence of his automobile. Up to that time plaintiff had been driving at an "extremely slow speed." He then threw his levers into high gear, moved his hand at one of the men he knew, and looked at the street car which was approaching from the south; he attempted to avoid the street car but it was too late. The court said, "The plaintiff had the same opportunity, and could have seen the street car had he looked." The action of the trial court in sustaining the demurrer to the evidence of plaintiff was upheld. We think the facts in that case were entirely dissimilar to the facts in the case before us.

The jury in the case at bar saw and observed the witnesses and their testimony in favor of plaintiff was approved by the trial judge. We are unable to say that the court erred in overruling defendant's motion for a directed verdict; nor are we able to say that the finding in plaintiff's favor was against the manifest weight of the evidence.

Defendant further contends that the judgment is excessive. The evidence shows that plaintiff was taken immediately after the accident to Cook County Hospital, where he was attended by Dr. Zeiss, who testified that he examined the patient and found a wound about 3 inches long "in the middle third - middle and upper third of the left tibia and fibula. He also had a fracture through both bones in that area." It was a compound fracture;" that means that all the dead tissue, muscle and skin, removed the dirt, put the leg in a cast and drove a steinman pin through the heel bone, then applied the usual weights and pulleys to the leg, etc.; that he afterward removed the pin and the leg was encased in a plaster cast; that the patient was at the hospital for 40 or 12 weeks; that at the time of the trial (about 18 months after the accident) he had examined plaintiff and found there was an "elevation of the tibia in the middle third of the left leg. It is abnormal;" that there was ap-

proximately three-fourths of an inch shortening of the left leg and the pelvis naturally tilts on the left side to compensate for the shortening; and that the condition is permanent. On cross-examination the Doctor testified that plaintiff was treated by his assistant, and that the Doctor first saw plaintiff 5 days after the accident; that the Doctor was assigned to the "fracture ward" in July, 1934, and had treated between eight and nine thousand fractures.

Dr. Greenspahn, called by plaintiff, testified that on the day the trial began he took an X-ray picture of plaintiff and made a physical examination of the lower extremities; that he found there was a bulge and deformity of the left leg in the region of the shin bone - "a definite outward curvature, and below that point there was a drooping or cavity or depression of the shin bone;" that he found a three-quarter inch shortening of the left leg; that in his opinion the condition he found is permanent.

Plaintiff testified, describing the treatment the doctors gave him; that he was in the hospital a little more than 2½ months; that after he was discharged from the hospital he went there once a week, and later every two weeks; that these visits continued for a year after he left the hospital; that during the time he was at the hospital he suffered great pain, and once in awhile there is still sharp pain in his leg. The evidence shows that plaintiff was required to lie on his back in the hospital for about 2½ months, during which time various casts were on his legs which remained on for a period of about 6 months.

Upon a consideration of all the evidence in the record we are of opinion that the verdict of the jury is not so excessive as to warrant interference on our part.

The judgment of the Superior court of Cook county is affirmed.

JUDGMENT AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

proximately three-fourths of an inch shortening of the left leg and the pelvis naturally tilts on the left side to compensate for the shortening; and that the condition is permanent. On cross-examination the Doctor testified that plaintiff was treated by his assistant, and that the doctor first saw plaintiff 5 days after the accident; that the Doctor was assigned to the "fracture ward" in July, 1934, and had treated between eight and nine thousand fractures.

Dr. Greenspan, called by plaintiff, testified that on the day the trial began he took an X-ray picture of plaintiff and made a physical examination of the lower extremities; that he found there was a bulge and deformity of the left leg in the region of the skin bone - "a definite outward curvature, and below that point there was a dropping or cavity or depression of the skin bone;" that he found a three-quarter inch shortening of the left leg; that in his opinion the condition he found is permanent.

Plaintiff testifies, describing the treatment the doctors gave him; that he was in the hospital a little more than 3½ months; that after he was discharged from the hospital he went there once a week, and later every two weeks; that these visits continued for a year after he left the hospital; that during the time he was at the hospital he suffered great pain, and once in awhile there is still sharp pain in his leg. The evidence shows that plaintiff was required to lie on his back in the hospital for about 3½ months, during which time weight cords were on his legs while remaining on for a period of about 6 months.

Upon a consideration of all the evidence in the record we are of opinion that the verdict of the jury is not so excessive as to warrant interference on our part.

The judgment of the superior court of Cook county is affirmed.

JUDGMENT AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

40024

FRANK F. TRACY,
Plaintiff-Appellee,

vs.

BEN YOST,
Defendant.

Re: APPEAL OF SELECT OPERATING CORPORATION, a Corporation, and WM. C. QUENTMEYER,
Garnishees-Appellants.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

39A

296 I.A. 644

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

February 25, 1937, plaintiff brought suit against Ben Yost to recover $2850.91 plaintiff claimed was due him under the terms of a written contract entered into between him and Yost September 13, 1935, whereby plaintiff was to act as manager and personal representative of defendant in securing contracts of employment for defendant who was to appear at clubs, theatres, etc., in theatrical performances, for which services plaintiff was to receive a commission and payment of moneys advanced. Plaintiff, in his statement of claim itemizes the moneys he had expended, which aggregate $872.41. He also itemizes the commissions he claims to be due him for obtaining contracts for Yost, totalling $1978.50. Certain parties were named as garnishees and there was an affidavit that Yost was not a resident of this State; that he was about to depart from this State and have his effects moved from this State; that his place of residence was New York City. The garnishees were served by the bailiff of the Municipal court, whose return also shows personal service on the defendant, Yost. Plaintiff filed interrogatories for the garnishees to answer. March 10 a default judgment was entered against Yost for want of appearance for $2850.91, being the amount of plaintiff's claim.

March 29th Yost filed an affidavit in which he swore that

FRANK J. TRACY,
Plaintiff-Appellee,

vs.

EMIL VOGT,
Defendant.

APPELLATE MUNICIPAL COURT
OF CHICAGO.

296 I.A. 644

No: APPEAL OF MAJOR OF MAKING
CONTROLLATION, a corporation, and
WM. O. WOMBLEYOR,
Garnishees-Appellants.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

February 25, 1937, plaintiff brought suit against Emil Vogt to recover $2850.91 plaintiff claimed was due him under the terms of a written contract entered into between him and Vogt September 13, 1935, whereby plaintiff was to act as manager and personal representative of defendant in securing contracts of employment for defendant who was to appear at clubs, theatres, etc., in theatrical performances, for which services plaintiff was to receive a commission and 5 percent of monthly advances. Plaintiff, in his statement of claim itemizes the monies he had expended, which aggregate $872.41. He also itemizes the commissions he claims to be due him for obtaining contracts for Vogt, totalling $1972.50. Certain parties were named as garnishees and there was an affidavit that Vogt was not a resident of this state; that he was about to depart from this state and have his effects moved from this state; that his place of residence was New York City. The garnishees were served by the bailiff of the municipal court, whose return also shows personal service on the defendant, Vogt. Plaintiff filed interrogatories for the garnishees to answer. Upon no a default judgment was entered against Vogt for want of appearance for $2850.91, being the amount of plaintiff's claim.

Upon 20th Vogt filed an affidavit in which he swore that

he was not served by the bailiff of the Municipal court; that at the time of the alleged service he was appearing in a theatre at Stamford, Connecticut; that he knew nothing about the institution of the suit in Chicago until March 23rd, when he was informed of the fact by his New York counsel, who had received the papers from Chicago attorneys representing the garnishees. Yost further swore that he had read plaintiff's complaint carefully and that plaintiff's claim was "wholly false as deponent is not indebted to the said plaintiff in any amount and can, and will prove, upon the trial of this action, the utter falsity of any such claim", and he prayed that the judgment be vacated on the ground that there was no service upon him. There was also an affidavit of the deputy bailiff who purported to have served the writ on Yost and the garnishees, the substance of which was that he had not served Yost personally but had left a copy of the writ for the garnishees with the garnishee William Quentmeyer. On the same day Yost's counsel made a motion that leave be given him to file a special appearance and that the judgment be vacated. On the same day an order was entered giving leave to Yost to file a special appearance, and the motion to vacate the judgment was continued.

Other motions were made and orders entered, and on April 27 the court overruled Yost's motion to vacate the judgment.

The record further discloses a number of orders and motions requiring the garnishees to file documents, and their failure to do so until plaintiff moved that they be adjudged in contempt of court for failure to comply with the court's order to file certain documents, which documents were later filed. November 23rd the case was heard before the court without a jury. Abe Cohen, one of the garnishees, was discharged and judgment was entered against garnishees William Quentmeyer and Select Operating Corporation for $2850.91. December 1, 1937, Quentmeyer and the Select Operating

he was not served by the bailiff of the municipal court; that at the time of the alleged service he was appearing in a theatre at Stamford, Connecticut; that he knew nothing about the institution of the suit in Chicago until March 23rd, when he was informed of the fact by his New York counsel, who had received the papers from Chicago attorneys representing the garnishees. That further sworn that he had read plaintiff's complaint carefully and that plaintiff's claim was "wholly false as defendant is not indebted to the said plaintiff in any amount and can, and will prove, upon the trial of this action, the utter falsity of any such claim", and he prayed that the judgment be vacated on the ground that there was no service upon him. There was also an affidavit of the deputy bailiff who purported to have served the writ on Yost and the garnishees, the substance of which was that he had not served Yost personally but had left a copy of the writ for the garnishees with the garnishee William Wantmeyer. On the same day Yost's counsel made a motion that leave be given him to file a special appearance and that the judgment be vacated. On the same day an order was entered giving leave to Yost to file a special appearance, and the motion to vacate the judgment was continued.

Other motions were made and orders entered, and on April 27 the court overruled Yost's motion to vacate the judgment.

The record further discloses a number of orders and motions requiring the garnishees to file documents, and their failure to do so until plaintiff moved that they be adjudged in contempt of court for failure to comply with the court's order to file certain documents, which documents were later filed. Nov. 1st 2nd the case was heard before the court without a jury. Abe Cohen, one of the garnishees, was discharged and judgment was entered against garnishees William Wantmeyer and Select Operating Corporation for $2880.91. December 1, 1927, Wantmeyer and the Select Operating

Corporation served notice they appealed from the judgment of March 10th against Yost and also from the judgment entered against them as garnishees November 23rd.

The garnishees contend that the court erred in refusing to quash the service of process on Yost and to vacate the judgment entered against him. We think it would serve no useful purpose to discuss the argument of counsel on this question, for we are of opinion that since the return of the bailiff specifically showed personal service on Yost, we cannot say that the court erred in refusing to quash the service on the basis of two affidavits - one by Yost and the other by the deputy bailiff. In this view, obviously the judgment against Yost must stand.

Plaintiff contends the evidence shows that Yost had a written contract with the garnishee Select Operating Corporation, whereby Yost was to produce an act for that garnishee at divers theatres and for which the garnishee agreed to pay Yost $400 a week, and such contract is in the record. Plaintiff further contends that after the service of the garnishee summons the Operating Corporation paid to Yost, under the terms of the written agreement above mentioned, $400 a week, less small deductions, and that the aggregate amount of those payments was more than the amount of plaintiff's judgment against Yost. While on the other side, the garnishees contend, as we understand counsel's argument, that eight persons, including Yost, took part in producing the act under the Yost contract, for which some of them received $35 a week, others a little more, leaving but about $55 or $60 a week to be retained by Yost personally, and that while $400 was paid weekly to Yost or his representative, garnishee Quentmeyer, this was merely a method employed as a matter of convenience, so that one person alone could sign the pay roll and not each member of the act be required to do so. We think all the evidence is to the effect that Yost was not to retain the $400 a week but was to pay the seven members of his troupe their weekly

Corporation served notice they appealed from the judgment of March 10th against Yost and also from the judgment entered against them as garnishees November 23rd.

The garnishees contend that the court erred in refusing to quash the service of process on Yost and to vacate the judgment entered against him. We think it would serve no useful purpose to discuss the argument of counsel on this question, for we are of opinion that since the return of the bailiff specifically showed personal service on Yost, we cannot say that the court erred in refusing to quash the service on the basis of two affidavits - one by Yost and the other by the deputy bailiff. In this view, ordinarily the judgment against Yost must stand.

Plaintiff contends the evidence shows that Yost had a written contract with the garnishee Select Operating Corporation, whereby Yost was to produce an act for that garnishee at diverse theatres and for which the garnishee agreed to pay Yost $400 a week, and such contract is in the record. Plaintiff further contends that after the service of the garnishee summons the Operating Corporation paid to Yost, under the terms of the written agreement above mentioned, $400 a week, less small deductions, and that the aggregate amount of those payments was more than the amount of plaintiff's judgment against Yost. While on the other side, the garnishees contend, as we understand counsel's argument, that eight persons, including Yost, took part in producing the act under the Yost contract, for which some of them received $5 a week, others a little more, leaving but about $50 or $60 a week to be retained by Yost personally, and that while $400 was paid weekly to Yost or his representative, garnishee Westchester, this was merely a method employed as a matter of convenience, so that one person alone could sign the pay roll and not each member of the act be required to do so. We think all the evidence is to the effect that Yost was not to retain the $400 a week but was to pay the seven members of his troupe their weekly

salaries. But from the evidence the question whether the weekly salaries of the seven members of the act were due and owing from the garnishee Select Operating Corporation, or from Yost, is uncertain. Obviously the Select Operating Corporation would be liable for the weekly salary coming to Yost from it, and which it paid out after service of the garnishee summons, but what this amount is we are not able to ascertain from the evidence.

We are further of the opinion that the judgment against the garnishee Quentmeyer is not sustained by the evidence. On the contrary, we think it shows that Quentmeyer was in no way indebted to the defendant, Yost, and the judgment against him is reversed. The judgment against the garnishee Select Operating Corporation is reversed and the matter remanded as to that garnishee.

JUDGMENT AGAINST QUENTMEYER REVERSED.
JUDGMENT AGAINST SELECT OPERATING
CORPORATION REVERSED AND THE CAUSE
REMANDED.

McSurely, P. J., and Matchett, J., concur.

salaries. But from the evidence the question whether the weekly salaries of the seven members of the act were the sums owing from the garnishee Select Operating Corporation, or from Yost, is uncertain. Obviously the select Operating Corporation would be liable for the weekly salary coming to Yost from it, and which it paid out after service of the garnishee summons, but what is the amount is we are not able to ascertain from the evidence.

We are further of the opinion that the judgment against the garnishee garnishee is not sustained by the evidence. On the contrary, we think it appears that garnishee was in no way indebted to the defendant, Yost, and the judgment against him is reversed. The judgment against the garnishee Select Operating Corporation is reversed and the matter remanded as to that garnishee.

JUDGMENT AGAINST GARNISHEE REVERSED.
JUDGMENT AGAINST SELECT OPERATING
CORPORATION REVERSED AND THE CAUSE
REMANDED.

McBurney, P. J., and Marshall, J., concur.

40037

CHARLOTTE SABARNIA,
Plaintiff,

vs.

MAE ROBINSON,
Defendant.

BURTON I. STOLARSKY,
(Petitioner) Appellee,

vs.

FRANK W. BROWN,
(Respondent) Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

296 I.A. 644[3]

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

August 25, 1937, plaintiff brought an action against defendant claiming that she had suffered personal injuries through the negligence of defendant in giving plaintiff a permanent wave. The damages were laid at $1000; September 17th defendant, through her attorney, Frank W. Brown, filed an affidavit of defense which, among other things, denied that she was negligent in the performance of the work. October 11th attorney Brown serveda notice on plaintiff's attorney that at 9:30 a. m., October 15th he would appear before Judge McGary of the Municipal court and ask for a rule on plaintiff to file a bill of particulars, for leave to file interrogatories, and a rule on plaintiff to answer them. October 15th an order was entered postponing the matter to October 18th. October 18th an order appears on the record striking defendant's motion "for want of prosecution, (Plaintiff responded.)" The same day attorney Brown served another notice on plaintiff's attorney that he would appear at 9:45 a. m. on the 19th of October before Judge McGary and ask for a rule on the plaintiff to file a bill of particulars within 5 days, and for a

CHARLOTTE MALAMUTA, Plaintiff,	
vs.	
MAE ROBINSON, Defendant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
BURTON I. STOMARSAY, (Petitioner) Appellee,	
vs.	
FRANK W. BROWN, (Respondent) Appellant.	

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

August 25, 1937, plaintiff brought an action against defendant claiming that she had suffered personal injuries through the negligence of defendant in giving plaintiff a permanent wave. The damages were laid at $1000; September 17th defendant, through her attorney, Frank W. Brown, filed an affidavit of defense which, among other things, denied that she was negligent in the performance of the work. October 11th attorney Brown serves notice on plaintiff's attorney that at 9:30 a. m., October 13th he would appear before Judge Scherry of the municipal court and ask for a rule on plaintiff to file a bill of particulars, for leave to file interrogatories, and a rule on plaintiff to answer them. October 13th an order was entered postponing the matter to October 18th. October 18th an order appears on the record striking defendant's motion "for want of prosecution, Plaintiff responded." The same day attorney Brown served another notice on plaintiff's attorney that he would appear at 9:45 a. m. on the 19th of October before Judge Scherry and ask for a rule on the plaintiff to file a bill of particulars within 5 days, and for a

rule on plaintiff "to answer the set of interrogatories heretofore filed" within 5 days. October 19th an order was entered postponing the matter until October 22nd at 2 p. m., and the record then shows 19 interrogatories filed at that time, and an order was entered overruling defendant's motion for a Bill of Particulars, giving leave to defendant to file the interrogatories instanter, and that plaintiff be required to answer all the interrogatories except 6, which were specifically mentioned, within 5 days. October 27th plaintiff filed answers to the interrogatories, and November 2nd attorney Brown served notice on plaintiff's attorney that at 9:45 a. m. November 3rd he would appear before Judge McGary and move the court for leave to file an "additional set of interrogatories" and for a rule on plaintiff to answer them; the notice stated a copy of the interrogatories was attached but they do not appear in the record. November 3rd defendant's motion to file additional interrogatories was denied and the order continues, "Now comes plaintiff's attorney and moves the Court to assess the costs vs attorney, F. W. Brown, which motion the Court orders entered and postponed to November 10th, 1937, at 2 P. M." November 10th there appears in the record a petition verified by plaintiff's attorney setting up, among other things, the filing of the suit on August 25, 1937, the entry of defendant's appearance by her attorney, Frank W. Brown, on September 17th and the filing of an affidavit of merits on that date, and that the cause was set for trial November 1st; that afterward Brown presented motions with the intention of causing delay and to harrass plaintiff and her attorney and defeat an early disposition of the case, and that to carry out his intention Brown on October 11th served notice on plaintiff's attorney that he would appear before Judge McGary on October 15th and ask leave to file interrogatories, etc., and for rule on plaintiff to answer; that plaintiff's attorney appeared in court at the time in response to the motion and inquired

rule on plaintiff "to answer the set of interrogatories heretofore filed" within 5 days. October 19th an order was entered postponing the matter until October 22nd at 2 p. m., and the record then shows 19 interrogatories filed at that time, and an order was entered overruling defendant's motion for a Bill of Particulars, giving leave to defendant to file the interrogatories instanter, and that plaintiff be required to answer all the interrogatories except 6, which were specifically mentioned, within 5 days. October 27th plaintiff filed answers to the interrogatories, and November 2nd attorney Brown served notice on plaintiff's attorney that at 9:45 a. m. November 3rd he would appear before Judge Mabry and move the court for leave to file an "additional set of interrogatories" and for a rule on plaintiff to answer them; the notice stated a copy of the interrogatories was attached but they do not appear in the record. November 3rd defendant's motion to file additional interrogatories was denied and the order continues, "Now comes plaintiff's attorney and moves the Court to assess the costs to attorney, F. W. Brown, which motion the Court orders entered and postponed to November 10th, 1927, at 2 p. m." November 10th there appears in the record a petition verified by plaintiff's attorney setting up, among other things, the filing of the suit on August 25, 1927, the entry of defendant's appearance by her attorney, Frank W. Brown, on September 17th and the filing of an affidavit of merits on that date, and that the cause was set for trial November 1st; that afterward Brown presented motions with the intention of causing delay and to harrass plaintiff and her attorney and defeat an early disposition of the case, and that to carry out his intention Brown on October 11th served notice on plaintiff's attorney that he would appear before Judge Mabry on October 13th and ask leave to file interrogatories, etc., and for rule on plaintiff to answer; that plaintiff's attorney appeared in court at the time in response to the motion and inquired

of the Minute clerk about when the matter might be heard and was advised that no such matter was on his call; that petitioner remained in the court room about 40 minutes, believing that Brown would present the motion; that the clerk advised counsel that the motions on the daily sheet would not be called that day. Thereupon plaintiff's counsel, who will hereinafter be referred to as the petitioner, left the court room and later received a call from the clerk of the court that defendant's attorney had presented his motion after all other motions had been heard, and that thereupon petitioner advised the court what had been done; that the court postponed the motion until October 18th, placing it on the contested call at 11 a. m.; that at the latter time petitioner appeared, waited for the motion to be called, and the clerk called the motion; that Brown did not appear, and the court struck the motion for want of prosecution.

The petition further sets up that afterward Brown, on the same day, again served petitioner with another notice that on October 19th he would appear and ask for a bill of particulars; that petitioner appeared and objected to the motion and the matter was postponed to October 22 at 2 p. m.; that on October 22nd he again appeared when the court overruled defendant's motion for a bill of particulars and gave defendant leave to file interrogatories; that November 1, the date on which the cause was set for trial, petitioner was ready but Brown sought and was granted a continuance to November 16th; that immediately thereafter Brown again served notice on petitioner that he would appear on November 3rd at 9:45, a. m., with a similar motion, requiring plaintiff to answer additional interrogatories; that Brown failed to place the number of the motion on the notice served on petitioner; the petitioner appeared and spent practically all morning waiting for the motion to be called. The motion was called, petitioner responded,

of the Minute clerk about when the matter might be heard and was advised that no such matter was on his call; that petitioner remained in the court room about 40 minutes, believing that Brown would present the motion; that the clerk advised counsel that the motions on the daily sheet would not be called that day. Thereupon plaintiff's counsel, who will hereinafter be referred to as the petitioner, left the court room and later received a call from the clerk of the court that defendant's attorney had presented his motion after all other motions had been heard, and that thereupon petitioner advised the court what had been done; that the court postponed the motion until October 18th, placing it on the contested call at 11 a. m.; that at the latter time petitioner appeared, waited for the motion to be called, and the clerk called the motion; that Brown did not appear, and the court struck the motion for want of prosecution.

The petition further sets up that afterward Brown, on the same day, again served petitioner with another notice that on October 19th he would appear and ask for a bill of particulars; that petitioner appeared and objected to the motion and the matter was postponed to October 22 at 2 p. m.; that on October 22nd he again appeared when the court overruled defendant's motion for a bill of particulars and gave defendant leave to file interrogatories; that November 1, the date on which the cause was set for trial, petitioner was ready but Brown sought and was granted a continuance to November 15th; that immediately thereafter Brown again served notice on petitioner that he would appear on November 3rd at 9:45, a. m., with a similar motion, requiring plaintiff to answer additional interrogatories; that Brown failed to place the number of the motion on the notice served on petitioner; the petitioner appeared and spent practically all morning waiting for the motion to be called. The motion was called, petitioner responded,

but Brown did not appear; thereupon the petitioner advised the court of what Brown had been doing and the court advised his clerk to telephone Brown to explain the reasons of his failure to present his motion, and that what Brown did was to vex and harrass petitioner and delay the trial of the cause, and the prayer was that an order be entered assessing the costs against Brown, etc.

November 10th an order was entered by Judge McGary which recites the coming on for hearing of the motion to assess costs against Brown, and the court being fully advised, the motion was sustained and the costs assessed at $50. November 16th, the record discloses, the cause was heard by the court without a jury; the court found in favor of plaintiff and against defendant Mae Robinson, and assessed plaintiff's damages at $200. Afterward defendant made a motion for a new trial, which is not important in the matter before us.

November 22nd Brown caused notice to be served on plaintiff's attorney that he would appear the next day at 9:30 o'clock before Judge McGary to present his petition, copy of which was said to be attached to the notice, and ask for an order in accordance with the relief prayed for in that petition. November 23rd Brown's petition was filed, in which he averred that on October 15th he appeared before the court on his motion for rule on plaintiff to answer certain interrogatories, pursuant to notice he had given the day before to plaintiff's attorney, that when he appeared in the court room he found "that the court file was short"; that he went to the clerk's office and had the files sent up, and the motion placed at the bottom of the motion book; that the motion was called and an order entered, that he had no knowledge of any matter pending before the court on October 18th; that it was his understanding "that the court entered a rule on plaintiff on October 15th, when the motion was presented," to answer the inter-

but Brown did not appear; thereupon the petitioner advised the court of what Brown had been doing and the court advised his clerk to telephone Brown to explain the reasons of his failure to present his motion, and that that Brown did was to vex and harrass petitioner and delay the trial of the cause, and the prayer was that an order be entered assessing the costs against Brown, etc.

November 10th an order was entered by Judge Landry which recites the coming on for hearing of the motion to assess costs against Brown, and the court being fully advised, the motion was sustained and the costs assessed at $50. November 14th, the record discloses, the cause was heard by the court without a jury; the court found in favor of plaintiff and against defendant Lockington, and assessed plaintiff's damages at $200. Afterward defendant made a motion for a new trial, which is not important in the matter before us.

November 22nd Brown caused notice to be served on plaintiff's attorney that he would appear the next day at 9:30 o'clock before Judge Landry to present his petition, copy of which was said to be attached to the notice, and sue for an order in accordance with the relief prayed for in that petition. November 23rd Brown's petition was filed, in which he averred that on October 15th he appeared before the court on his motion for rule on plaintiff to answer certain interrogatories, pursuant to notice he had given the day before to plaintiff's attorney, that when he appeared in the court room he found "that the court file was short"; that he went to the clerk's office and had the files sent up, and the motion placed at the bottom of the motion book; that the motion was called and an order entered, that he had no knowledge of any matter pending before the court on October 15th; that it was his understanding "that the court entered a rule on plaintiff on October 15th, when the motion was presented," to answer the inter-

rogatories and did not learn anything to the contrary until the afternoon of October 18th "by looking at the file"; that he immediately served notice on plaintiff's attorney that he would appear the next day, October 19th; that he did no appear; that his motion was continued to October 22nd, when he asked for a rule on plaintiff to answer the interrogatories and for leave to file them; the motion was heard and the order entered requiring plaintiff to answer certain of the interrogatories; that afterward plaintiff answered the interrogatories but the answers were such as to make it necessary for additional interrogatories to be filed and answered, in order that defendant might be enabled to make a proper defense; that on November 3rd, pursuant to notice given plaintiff's attorney, Brown appeared before the court and made another motion for leave to file additional interrogatories, which was denied; that at that time, "something was said by the court about opposing counsel making a motion to assess costs and that the said motion was continued by the court until November 10, 1937, at 2 p. m."; that on November 9th Brown called plaintiff's attorney's office and left a messgge that he was going to Southern Illinois on November 10th on a suit there pending and would not be able to be present at the hearing of the motion to assess costs against him on the following day, but would ask for a continuance; that he employed attorney Metzen to appear in court and ask for a continuance on the ground that Brown was engaged in another law suit down state; that Metzen did appear, made a motion for continuance but the motion was denied and a fine of $50 was assessed against Brown.

Brown's petition further set up that Brown was representing another attorney,who was advanced in years and not in active practice of law,in the instant case, and that he received but $20 for his services; that on November 20 he had occasion to look at the files in the clerk's office and found the petition filed by

rogatories and did not learn anything to the contrary until the afternoon of October 12th "by looking at the file"; that he immediately served notice on plaintiff's attorney that he would appear the next day, October 13th; that he did no appear; that his motion was continued to October 22nd, when he asked for a rule on plaintiff to answer the interrogatories and for leave to file them; the motion was heard and the order entered regarding plaintiff to answer certain of the interrogatories; that afterward plaintiff answered the interrogatories but the answers were such as to make it necessary for additional interrogatories to be filed and answered, in order that defendant might be enabled to make a proper defense; that on November 3rd, overnight to notice given plaintiff's attorney, firm appeared before the court and made another motion for leave to file additional interrogatories, which was denied; that at that time, "something was said by the court about opposing counsel making a motion to assess costs and that the said motion was continued by the court until November 10, 1927, at 2 p.m."; that on November 9th firm called plaintiff's attorney's office and left a message that he was going to consider filing on November 10th on a full there pending and would not be able to be present at the hearing of the motion to assess costs against him on the following day, but would ask for a continuance; that he employed attorney Patten to appear in court and ask for a continuance on the ground that Brown was engaged in another law suit down state; that Patten did appear, made a motion for continuance but the motion was denied and a fine of $50 was assessed against Brown.

Brown's petition further set up that Brown was represented another attorney, who was advanced in years and not in active practice of law, in the instant case, and that he received but $20 for his services; that on November 30 he had occasion to look at the files in the clerk's office and found the motion filed by

plaintiff's attorney, which we have above referred to; that Brown had no knowledge of the existence of the petition until 10 a. m. November 20; that no notice was given him of the filing of the petition; that it was apparently filed by plaintiff's attorney without notice of any kind, and he had not been given an opportunity to answer, and the prayer was that the judgment assessing $50 against him be vacated and set aside. November 23rd an order was entered continuing the matter until December 8th, and on the latter date an order was entered overruling Brown's motion to expunge the order of November 10th, from which order Brown prosecutes this appeal.

Brown's petition was in the nature of an answer to the petition filed by plaintiff's counsel to assess costs against Brown, and when, on December 8th, the court overruled Brown's motion to expunge the order of November 10th assessing costs against him, we must assume that the court considered the allegations of both petitions as well as what had theretofore taken place before him, so that Brown had a hearing on the merits.

In his brief Brown says that the answers made by plaintiff to the interrogatories were evasive, vague and uncertain, making it necessary for him to "present a third motion asking leave of court to file additional interrogatories"; that this motion was presented to Judge McGary but the "motion was denied by said judge without reading it himself and without allowing said attorney to state what the motion was." There is nothing in the record to warrant the statement that the trial Judge denied the motion without knowing what it was.

Rule 279 of the Municipal court, under which the court acted, provides in part that if unnecessary and vexatious motions are made, the court may require that the unsuccessful party or his attorney, if the court is of opinion that the fault was the attorney's, pay to the

plaintiff's attorney, which we have more referred to; that Brown had no knowledge of the existence of the petition until 10 a. m. November 20; that no notice was given him of the filing of the petition; that it was apparently filed by plaintiff's attorney without notice of any kind, and he had not been given an opportunity to answer, and the prayer was that the judgment aggregating $60 against him be vacated and set aside. November 23rd an order was entered continuing the matter until December 8th, and on the latter date an order was entered overruling Brown's motion to change the order of November 10th, from which order Brown prosecutes this appeal.

Brown's petition was in the nature of an answer to the petition filed by plaintiff's counsel to assess costs against Brown, and when, on December 8th, the court overruled Brown's motion to change the order of November 10th assessing costs against him, we must assume that the court considered the allegations of both petitions as well as what had theretofore taken place before him, so that Brown had a hearing on the merits.

In his brief Brown says that the answers made by plaintiff to the interrogatories were evasive, vague and uncertain, making it necessary for him to "present a third motion seeking leave of court to file additional interrogatories"; that this motion was presented to Judge Emery but the "motion was denied by said judge without reading it himself and without allowing said attorney to state what the motion was." There is nothing in the record to support the statement that the trial Judge denied the motion without knowing what it was.

Rule 279 of the municipal court, under which the court acted, provides in part that if unnecessary and vexatious motions are made, the court may require that the unsuccessful party or his attorney, if the court is of opinion that the fault was the attorney's, pay to the

successful party a sum not exceeding $10 as compensation for the time and expense incurred.

In contending that this rule is void, counsel says: "It is unreasonable because there is known to be a difference of opinion among men." We think it obvious this contention cannot be sustained. There are many rules of court and statutes as well as opinions that are susceptible of different interpretations, but this does not always render them void or unenforceable. But counsel further contends that the order appealed from should be reversed because under the rule, costs to the extent of only $10 can be assessed, while in the instant case costs imposed were $50. We are also of opinion that this contention cannot be sustained. We think a correct interpretation of the rule is that the court may, in its discretion, impose costs not exceeding $10 as compensation for the time and expense incurred in attending court on motions and other matters which seem to be unwarranted. And if a number of such motions are made, that fact can be taken into consideration.

In the instant case, we think the facts shown by the record, which we have rather fully set forth, warrant the court in assessing costs at $20. The action of defendant's counsel in failing to appear to present his motions at or near the time specified in the notices was unwarranted, and his later motion for an order permitting him to file additional interrogatories was without merit. The case was simple and the answers to the interrogatories theretofore filed were entirely sufficient.

Before entering judgment in this court for $20, we regret that we must say something more. The reply brief of Attorney Brown contains scandalous and scurrilous matter reflecting upon the trial Judge and opposing counsel, all of which is wholly unwarranted. It is the duty of this court to keep its records clean and free from

successful party a sum not exceeding $10 as compensation for the time and expense incurred.

In contending that this rule is void, counsel says: "It is unreasonable because there is room to be a difference of opinion among men." We think it obvious this contention cannot be sustained. There are many rules of court and statutes as well as opinions that are susceptible of different interpretations, but this does not always render them void or unenforceable. But counsel further contends that the order appealed from should be reversed because under the rule, costs to the extent of only $10 can be assessed, while in the instant case costs imposed were $20. We are also of opinion that this contention cannot be sustained. We think a correct interpretation of the rule is that the court may, in its discretion, impose costs not exceeding $10 as compensation for the time and expense incurred in attending court on motions and other matters which seem to be unwarranted. And if a number of such motions are made, that fact can be taken into consideration.

In the instant case, we think the facts shown by the record, which we have rather fully set forth, warrant the court in assessing costs at $20. The action of defendant's counsel in failing to appear to present his motions at or near the time specified in the notices was unwarranted, and his later motion for an order permitting him to file additional interrogatories was without merit. The case was simple and the answers to the interrogatories theretofore filed were entirely sufficient.

Before entering judgment in this court for $10, we regret that we must say something more. The reply brief of Attorney Brown contains scandalous and scurrilous matter reflecting upon the trial judge and opposing counsel, all of which is wholly unwarranted. It is the duty of this court to keep its records clean and free from

scandal and therefore the reply brief will be stricken. Green v. Elbert, 137 U. S. 615; Royal Arcanum v. Green, 237 U. S. 531; Reiter v. Ill. Nat. Cas. Co., 291 Ill. App. 30.

The judgment of the Municipal court of Chicago is reduced from $50 to $20, and as so reduced the judgment is affirmed.

JUDGMENT AFFIRMED AS REDUCED.

McSurely, P. J., concurs.

Matchett, J., dissenting in part: I concur in the order striking the reply brief but dissent from the conclusion reached that a fine of $20 be imposed. If we consider Brown's petition to be in the nature of an answer, issues of fact were presented on which evidence should have been taken. Even lawyers are, I think, entitled to due process.

accused and therefore the media relief will be evident. Cases: Albert, 137 U. S. 319; Chicago Express v. Crane, 127 U. S. 441; Reiter v. Ill. Cen. Ry., 241 Ill. App. 3.

The judgment of the municipal court of $14,850 is reduced from $25 to $100, and as so reduced the judgment is affirmed.

MUNICIPAL JUDGMENT AS MODIFIED.

McCurdy, P. J., concurs.

Matchett, J., dissenting in part: I concur in the order striking the traffic order but dissent from the modification reducing that a fine of $25 be imposed. If we consider from the evidence to be in the nature of an error, leaves it not more irrelevant on a lot evidence should have been taken. Not having one, I think, contrary to the prayer.

40273 - 40276

ISAAC FREEHLING and JULIET S. FREEHLING,
Plaintiffs,

vs.

BANKERS BUILDING, INCORPORATED, LORANZO C. DILKS, and THE ILLINOIS NATIONAL BANK AND TRUST COMPANY OF ROCKFORD, as Successor Trustee,
Defendants.

BANKERS BUILDING, INCORPORATED, and THE ILLINOIS NATIONAL BANK AND TRUST COMPANY OF ROCKFORD, as Successor Trustee,
Appellants.

Interlocutory Appeal from order of Superior Court of Cook County denying motion to vacate interlocutory injunction.

296 I.A. 644

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

By these consolidated appeals (one from an order entered April 28, 1938, enjoining the defendants temporarily as prayed, and the other from an order entered June 8, 1938, denying the motion of defendants to dissolve the temporary injunction) defendants seek to reverse both orders. The injunction was granted on the complaint alone the day after it was filed without notice and without bond. The order denying the motion to dismiss was entered after notice and hearing and after plaintiff filed an amendment to the original complaint.

The facts are that on July 10, 1926, Ernest J. Jackson and Carrie M. Jackson were the owners of certain premises in Chicago located at the southwest corner of Adams and Clark streets. On that day they executed a 99 year lease of the premises to the Adams-Clark Building Corporation, now the Bankers Building, Inc., defendant in this case. On the same day by warranty deed they conveyed the premises to the National Bank of the Republic, trustee, with the

40275 - 40276

ISAAC FRENKLING and DOLLY S. FRENKLING,

Plaintiffs,

vs.

BANKERS BUILDING, INCORPORATED, LORANDO C. DILLS, and THE ILLINOIS NATIONAL BANK AND TRUST COMPANY OF ROCKFORD, as Successor Trustee,

Defendants.

BANKERS BUILDING, INCORPORATED, and THE ILLINOIS NATIONAL BANK AND TRUST COMPANY OF ROCKFORD, as Successor Trustee,

Appellants.

Interlocutory appeal from order of Superior Court of Cook County denying motion to vacate interlocutory injunction.

295 I.A. 644

MR. JUSTICE SCHWERT DELIVERED THE OPINION OF THE COURT.

By these consolidated appeals (one from an order entered April 23, 1954, retaining the defendants in possession, and the other from an order entered June 3, 1954, denying the motion of defendants to dissolve the temporary injunction) defendants seek to reverse both orders. The injunction was granted on the complaint alone the day after it was filed without notice and without bond. The order denying the motion to dissolve was entered after notice and hearing and after plaintiff filed an amendment to the original complaint.

The facts are that on July 10, 1952, Ernest G. Anderson and Carrie F. Jensen were the owners of certain premises in Chicago located at the southeast corner of Adams and Clark streets. On that day they executed a 99 year lease of the premises to the Adams-Clark Building Corporation, now the Bankers Building, Inc., defendant in this case. On the same day by warranty deed they conveyed the premises to the National Bank of the Republic, trustee, with the

defendant, Illinois Bank and Trust Company of Rockford, as successor in trust. The trust estate was divided into 5,000 units, and certificates of ownership were issued to the beneficiaries of the trust, who became the equitable owners of the property.

Each plaintiff is the owner of one unit out of the 5,000 units issued for the whole property. The lease was for a term of 99 years from June 1, 1926. The yearly rental reserved was $275,000 plus all taxes levied against the land for any improvements on it. The lease gave the lessee the option to purchase the fee (upon certain conditions) for the sum of $5,500,000 plus accrued rentals, taxes, expenses, etc. The lessee by the terms of the lease agreed to demolish the building then on the premises and erect a new building free of liens, to cost not less than $4,650,000 in accordance with certain plans and specifications. The lessee erected the building but has not exercised its option to purchase. The original and successor trustees have from time to time disbursed funds to the owner holders of these certificates.

March 10, 1938, the lessee, Bankers Building, Inc., mailed to the successor trustee a communication which is attached to the bill and marked Exhibit B. It is a document of 2½ printed pages, purports to recite the history of the building and the purposes for which the land trust certificates were issued, and to give a description of liens on and interests in the leasehold, including $5,000,000 First Mortgage 6½% bonds, $1,000,000 Second Mortgage Leasehold 7% bonds, $750,000 7% Debentures, $582,595 7% unsecured notes, $1,000,000 preferred stock and $900,000 common stock. The communication describes the income from the building, stating that it has steadily declined from a peak of $1,449,667.83 in 1930, to a low of $815,885.95 in 1936, with an increase to $853,973.55 in 1937. The communication goes on to state that in the event of failure to meet the full payment of ground rent in the amount of $275,000 a

defendant, Illinois Land and Trust Company of Rockford, as successor in trust. The trust estate was divided into 5,000 units, and certificates of ownership were issued to the beneficiaries of the trust, who became the existing owners of the property.

Each participant is the owner of one unit out of the 5,000 units issued for the whole property. The lease was for a term of 99 years from June 1, 1926. The yearly rental reserved was $275,000 plus all taxes levied against the land for any improvements on it. The lease gave the lessee the option to purchase the fee (upon certain conditions) for the sum of $5,500,000 plus accrued rentals, taxes, expenses, etc. The lessee by the terms of the lease agreed to demolish the building then on the premises and erect a new building free of liens, to cost not less than $4,500,000 in accordance with certain plans and specifications. The lessee erected the building, but has not exercised its option to purchase. The original and successor trustees have from time to time disbursed funds to the owner holders of these certificates.

Since 1929, the lessee, Sanitary Building, Inc., mailed to the successor trustee a communication which is attached to the bill and marked Exhibit B. It is a document of 32 printed pages, purports to recite the history of the building and the purposes for which the land trust certificates were issued, and to give a description of liens on and interests in the leasehold, including $5,000,000 First Mortgage 6½% bonds, $1,000,000 Second Mortgage leasehold 7% bonds, $720,000 7% Debentures, $582,805 7% unsecured notes, $1,000,000 preferred stock and $500,000 common stock. The communication describes the income from the building, stating that it has steadily declined from a peak of $1,449,667.82 in 1930, to a low of $815,065.95 in 1936, with an increase to $853,973.55 in 1937. The communication goes on to state that in the event of failure to meet the full payment of ground rent in the amount of $275,000 a

year, the trustee might be obligated to take over the property on behalf of the certificate holders. It states that all classes of ownership except the holders of the land trust certificates have made radical adjustments and suffered serious losses, and in view of all the circumstances the letter suggests a plan by which the amount to be distributed to the holders of the certificates would be $45 per annum instead of $55 as heretofore, the difference available to be placed in a separate trust fund and used to purchase outstanding land trust certificates. The letter goes on to point out the supposed benefits which would result from the plan; says that the situation seems to justify earnest consideration of an adjustment, and requests that the defendant successor trustee submit the proposal to the holders of the land trust certificates at its earliest convenience. The successor trustee did this in a printed letter directed to the certificate holders, stating that the letter embodied facts presented to it in a series of conferences of parties interested, and enclosing a form of consent and direction for acceptance of the proposed plan for amendment of the 99 year lease; gradual retirement of outstanding land trust certificates and the gradual reduction of the option price at which the Bankers Building, Incorporated, might buy the property. The letter concludes: "If you approve the plan you should sign and return the letter of consent in the enclosed stamped envelope at once. An extra copy of the letter of consent to which the plan is appended is given you for your attention. We shall appreciate an early reply."

The complaint alleges that the provisions of the proposed amendment are ambiguous, vague and uncertain; that it is difficult to determine from the exhibits the exact amount of rental which would be guaranteed to be paid if the amendment was adopted or to determine the amount of money which would be used for the retirement of land trust certificates; that under the provisions of the declara-

year, the trustee might be obligated to turn over the property on behalf of the certificate holders. It states that all changes of ownership except the matters of the land trust certificates have made radical adjustments and matters not going to see, and in view of all the circumstances the letter suggests a plan by which the amount to be distributed to the holders of the certificates would be $45 per annum instead of $95 as heretofore, the difference available to be placed in a separate trust fund and used to purchase outstanding land trust certificates. The letter goes on to point out the approved benefits which would result from the plan; says that the situation seems to justify earnest consideration of an adjustment, and requests that the defendant successor trustee submit the proposal to the holders of the land trust certificates at its earliest convenience. The successor trustee did this in a printed letter directed to the certificate holders, stating that the letter embodied facts presented to it in a series of conferences of parties interested, and enclosing a form of consent and direction for acceptance of the proposed plan for amendment of the 99 year lease; gradual retirement of outstanding land trust certificates and the gradual reduction of the option price at which the property, incorporated, might buy the property. The letter concludes: "If you approve the plan you should sign and return the letter of consent in the enclosed stamped envelope at once. An extra copy of the letter of consent to which the plan is appended is given for your attention. We shall appreciate an early reply."

The complaint alleges that the provisions of the proposed amendment are ambiguous, vague and uncertain; that it is difficult to determine from the exhibits the exact amount of rental which would be guaranteed to be paid if the amendment was adopted or to determine the amount of money which would be need for the retirement of land trust certificates; that under the provisions of the declara-

tion of trust the holders of the land trust certificates are powerless to prevent the approval by the successor trustee of the proposed amendment unless an injunction issue and the bill charges upon information and belief that the Bankers Building, Incorporated, and its agents and servants are endeavoring to secure the consent of the owners of the land trust certificates to the proposed amendment, in an attempt to induce the Illinois National Bank & Trust Company to approve, confirm and ratify the proposed amendment to the lease; that by submitting to the land trust certificate holders the proposed amendment the trustee has violated its fiduciary duty to the holders of the land trust certificates, and that the proposed amendment is a part of a deliberate scheme on the part of defendants to create a situation in which the defendants may unjustly enrich themselves at the expense of the holders of the land trust certificates; that if the proposed amendment is approved, irreparable injury will result to such holders. The injunction restrained defendants from in any way amending the lease.

The complaint is filed in behalf of these two holders of the two units. Other holders have not joined although the suit is representative for the use and benefit of other holders similarly situated. While much is stated by way of conclusion and epithet, and while many technical points are argued in the briefs, an examination of the record leads us to the conclusion that the actual facts set up in the bill are not sufficient to justify interference by a court of equity. The lease does not appear to grant arbitrary power to the trustee to consent to any amendment of it. The record as a matter of fact discloses no more than the submission of a plan to the holders of the certificates on the part of the trustee with a request that they either approve or disapprove. There is a suggestion that if the plan as submitted is disapproved the trustee may in the alternative apply to a court of equity for advice with reference to the execution of

tion of trust the holders of the land trust certificates are powerless to prevent the approval by the successor trustee of the proposed amendment unless an injunction issue and the bill charges upon information and belief that the Sears Building, Incorporated, and its agents and servants are conspiring to secure the consent of the owners of the land trust certificates to the proposed amendment, in an attempt to induce the Illinois National Bank & Trust Company to approve, confirm and ratify the proposed amendment to the lease; that by submitting to the land trust certificate holders the proposed amendment the trustee has violated its fiduciary duty to the holders of the land trust certificates, and that the proposed amendment is a part of a deliberate scheme on the part of defendants to create a situation in which the defendants may unjustly enrich themselves at the expense of the holders of the land trust certificates; that if the proposed amendment is approved, irreparable injury will result to such holders. The injunction restrained defendants from in any way amending the lease.

The complaint is filed in behalf of these two holders of the two units. Other holders have not joined although the suit is representative for the use and benefit of other holders similarly situated. While such is stated by way of conclusion and epithet, and while many technical points are argued in the briefs, an examination of the record leads us to the conclusion that the actual facts set up in the bill are not sufficient to justify interference by a court of equity. The lease does not appear to grant arbitrary power to the trustee to consent to any amendment of it. The record is a matter of fact disclosing no more than the submission of a plan to the holders of the certificates on the part of the trustee with a request that they either approve or disapprove. There is a suggestion that if the plan as submitted is disapproved the trustee may in the alternative apply to a court of equity for advice with reference to the execution of

the trust. This comes very far from being any action that would justify an injunction. On the contrary the successor trustee seems only to be vigilant in performing its duty. The nub of this whole matter appears to be that plaintiffs, owners of a very small interest in the entire premises, complain to the court that the trustee had submitted a plan to them for their acceptance or rejection, and has indicated that the situation with reference to its trust is such that it may be required to apply to a court of equity for advice. While many technical points have been argued with numerous citations of authority, no case is cited (and we believe no case will be found) where a trustee has been thus enjoined. As the Supreme Court said in Doose v. Doose, 300 Ill. 134:

> "An allegation of conspiracy, collusion and fraud must show the facts upon which it is based. The words themselves, unsupported by facts, are mere vituperation."

The court erred in granting the temporary injunction; it erred in denying the motion of defendant to dissolve it. Neither plaintiffs' original bill nor their amended bill when stripped of pure conclusions show any facts which would call for equitable relief. The injunction does not preserve the status. It destroys it and interferes with the discretion of the successor trustee in the performance of its duties.

The orders are reversed.

REVERSED.

McSurely, P. J., and O'Connor, J., concur.

the trust. This comes very far from being any action that would justify an injunction. In the industry the successor trustee seems only to be vigilant in protecting its duty. The rule of this whole matter appears to be that plaintiffs, owners of a very small interest in the entire property, complain to the court that the trustee had submitted a plan to them for their acceptance or rejection, and has indicated that the situation with reference to its trust is such that it may be required to apply to a court of equity for advice. While many technical points have been argued with numerous citations of authority, no case is cited (and we believe no case will be found) where a trustee has been thus enjoined. As the supreme court said in Doose v. Doose, 44 Ill. 164:

> "An allegation of arbitrarity, collusion and fraud must support the facts upon which it is based. The mere themselves, unsupported by facts, are mere vituperation."

The court erred in granting the temporary injunction; it erred in denying the motion to dissolve to dissolve it. Neither plaintiffs' original bill nor their amended bill show infringed of pure conclusions from any facts which would call for equitable relief. The injunction does not preserve the status. It destroys it and interferes with the discretion of the successor trustee in the performance of its duties.

The orders are reversed.

REVERSED.

Lorentzen, P. J., and Gordon, J., concur.

40268

SAMUEL LEVINS and GENCO INC.,
an Illinois Corporation,
Appellees,

vs.

CITY OF CHICAGO, a Municipal
Corporation, EDWARD J. KELLY,
Mayor of the City of Chicago,
and JAMES P. ALLMAN, Commissioner
of Police of the City of Chicago,
Appellants.

INTERLOCUTORY APPEAL FROM
SUPERIOR COURT OF COOK
COUNTY.

296 I.A. 645

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this appeal the defendants, the City of Chicago, Mayor Kelly and Commissioner of Police, Allman, seek to reverse an order of the Superior court of Cook county entered May 6, 1938, enjoining them from "seizing, destroying, converting, confiscating or otherwise interfering with the sale and use of the devices known as 'Magic Roll' and 'Skill Roll'", etc. The matter came on for hearing on plaintiffs' verified, amended complaint and the report of a master in chancery. The court followed the master's recommendation and entered the restraining order complained of.

The amended complaint, in short compass, alleges that plaintiff Samuel Levins is engaged in the business of buying, operating and distributing coin-operated machines and devices in Chicago, including devices referred to as "Magic Roll" and "Skill Roll"; that plaintiff Genco Inc. is engaged in the business of manufacturing, selling and distributing "coin-operated service, vending and amusement devices," two of which are known as "Magic Roll" and "Skill Roll;" that in experimentation and development it has expended in excess of $10,000, and also has invested in dyes, tools, etc., more than $5,000, and that plaintiffs, until interfered with by defendants, enjoyed a profitable business in the manufacture and sale of the devices; that the "Magic Roll" consists of a flat surface 8 feet 4 inches long and 23½ inches wide; the entire playing

40268

SAMUEL LEVINS and [illegible] INC.,
an Illinois Corporation,
Appellees,

vs.

CITY OF CHICAGO, a municipal
Corporation, EDWARD J. KELLY,
Mayor of the City of Chicago,
and JAMES P. [illegible], Commissioner
of Police of the City of Chicago,
Appellants.

INTERLOCUTORY APPEAL FROM
SUPERIOR COURT OF COOK
COUNTY.

296 I.A. 645

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this appeal the defendants, the City of Chicago, Mayor Kelly and Commissioner of Police, Allman, seek to reverse an order of the Superior court of Cook county entered May 6, 1938, enjoining them from "seizing, destroying, converting, confiscating or otherwise interfering with the sale and use of the devices known as 'Magic Roll' and 'Skill Roll'", etc. The matter came on for hearing on plaintiffs' verified, amended complaint and the report of a master in chancery. The court followed the master's recommendation and entered the restraining order complained of.

The amended complaint, in short compass, alleges that plaintiff Samuel Levins is engaged in the business of buying, operating and distributing coin-operated machines and devices in Chicago, including devices referred to as "Magic Roll" and "Skill Roll"; that plaintiff Venos Inc. is engaged in the business of manufacturing, selling and distributing "coin-operated service, vending and amusement devices," two of which are known as "Magic Roll" and "Skill Roll;" that in experimentation and development it has expended in excess of $10,000, and also has invested in dyes, tools, etc., more than $5,000, and that plaintiffs, until interfered with by defendants, enjoyed a profitable business in the manufacture and sale of the devices; that the "Magic Roll" consists of a flat surface 8 feet 4 inches long and 2½ inches wide; the entire playing

surface tilts slightly upward; the far end of it inclines sharply upward; that there are 9 white circular spots, arranged in diamond fashion on the inclined portion of the board; the surface below the white spots is highly magnetized by electricity; the playing surface is enclosed on its two sides and is backed by wooden boards extending above the wooden surface; that the game is played with 9 metallic balls. In order to use the device a coin is inserted in a slot located at the front of the device which causes the 9 balls to be released for the use of the player; the player takes one ball at a time in his hand and propels it along the surface of the device and over the inclined portion of the surface; when a ball hits the white round surface spots it becomes fixed and held on the spot by magnetic action; whether a ball becomes so fixed is determined by the skill of the player because the direction, speed and "English" on a ball, as determined by the player, are the determining factors. At the far end of the device is an electrically operated scoring rack which records the score, the numbers corresponding with the spots to which the ball becomes fixed.

The "Skill Roll" is physically much the same as the "Magic Roll" and operates similarly, the fundamental difference being that the balls used in playing the "Skill Roll" lodge in cups at the back or inclined part of the playing field. The balls used are wooden and the skill of the player determines the cup in which the balls lodge, and the score is recorded in accordance with the cup into which the ball lodges.

It is further alleged that the games are strictly ones of skill; that to achieve good results it is necessary that coordination be developed between the hand, the eye and the muscles of the player; that the devices "pay out nothing to anybody at any time or for any reason"; that they deliver no merchandise of any description and give no prizes of any nature, and that the devices are not

surface tilts slightly upward; the top end of it inclines slightly upward; that there are 9 white circular spots, arranged in diamond fashion on the inclined portion of the board; the surface below the white spots is slightly magnetized by electricity; the playing surface is enclosed on its two sides and is bounded by wooden boards extending above the wooden surface; that the game is played with 9 metallic balls. In order to use the device a coin is inserted in a slot located at the front of the device which causes the 9 balls to be released for the use of the player; the player takes one ball at a time in his hand and propels it along the surface of the device and over the inclined portion of the surface; when a ball hits the white round surface spots it becomes fixed and stuck on the spot by magnetic action; whether a ball becomes fixed is determined by the skill of the player because the direction, speed and "lights" on a ball, as determined by the player, are the determining factors. At the far end of the device is an electrically operated scoring rack which records the score, the numbers corresponding with the spots to which the ball becomes fixed.

The "Skill Roll" is physically much the same as the "Magic Roll" and operates similarly, the fundamental difference being that the balls used in playing the "Skill Roll" lodge in cups at the back or inclined part of the playing field. The balls used are wooden and the skill of the player determines the cup in which the balls lodge, and the score is recorded in accordance with the cup into which the ball lodges.

It is further alleged that the games are strictly games of skill; that to achieve good results it is necessary that coordination be developed between the hand, the eye and the muscles of the player; that the devices "pay out nothing to anybody at any time or for any reason"; that they deliver no merchandise of any description and give no prizes of any nature, and that the devices are not

in violation of the Criminal laws of the State; that in playing the game the player employs and uses practically every part of his body and every muscle; that the physical benefits derived from the play are very valuable; that the sole effect and purpose of depositing the coin in the device is to release the balls so that they may be available for the use of the player; that because of the possibility that the devices might, though improperly, be classified as bowling games, plaintiffs requested the City Clerk to accept its application (for licenses) with the appropriate fees, but that the clerk refused to accept the money for the reason that the devices were operated with a coin slot and therefore in violation of the ordinance of the City; that plaintiffs were advised by defendants that they would not, under any circumstances, be permitted to operate the devices in the City because they were in violation of two ordinances; that police officials of the City entered premises in Chicago where the devices were kept for public operation of the games, one in a drugstore and one in a tavern, and required the owners and occupants of the premises to remove the device; that by reason of such illegal acts and threats plaintiffs have been deprived of profits they otherwise would have made; that defendants pretend to justify their illegal acts by reason of an ordinance passed May 6, 1936, known as the "Bagatelle and Pigeon Hole" ordinance and another ordinance passed January 25, 1937; that the playing of the games by using the devices does not in any way tend to disturb the public welfare or to create a nuisance and that the ordinances are illegal and void; that the playing of the games furnishes clean and wholesome amusement; that plaintiffs have been discriminated against because City officials have permitted certain other coin-operated devices without interfering, such as player pianos, phonographs, talking machines, picture machines and punching bags.

Pictures of the two devices, as well as copies of the two

in violation of the criminal laws of the state; that in playing the game the player employs and uses practically every part of his body and every muscle; that the physical activity derived from the play are very valuable; that the skill and amount of deducting the coin in the device is to release the ball so that they may be available for the use of the player; that because of the possibility that the device might, though improperly, be classified as bowling games, plaintiffs requested the city clerk to accept its application (for licenses) with the appropriate fees, but that the clerk refused to accept the money for the reason that the devices were operated with a coin slot and therefore in violation of the ordinances of the city; that plaintiffs are advised by defendants that they would not, under any circumstances, be permitted to operate the devices in the city because they were in violation of two ordinances; that police officials of the city entered premises in Chicago where the devices were used for public operation of the games, one in a drugstore and one in a tavern, and required the owners and occupants of the premises to remove the devices; that by reason of such illegal acts and threats plaintiffs have been deprived of profits they otherwise would have made; that defendants pretend to justify their illegal acts by reason of an ordinance passed by a, this, known as the "Bowlette and Pigeon Hole" ordinance and another ordinance passed January 25, 1917; that the playing of the games by using the devices does not in any way tend to disturb the public welfare or to create a nuisance and that the ordinances are illegal and void; that the playing of the games furnishes clean and wholesome amusement; that plaintiffs have been discriminated against because city officials have permitted certain other coin-operated devices without interfering, such as player pianos, phonographs, vending machines, picture machines and punching bags.

Pictures of the two devices, as well as copies of the two

ordinances are attached to and made a part of the complaint. The "Bagatelle and Pigeon Hole" ordinance provides, sec. 1949a, Games Prohibited. "It shall be unlawful for any person to keep or use in any place of public resort within the city of Chicago any tables or implements for any game of bagatelle or pigeonhole.

"The term 'Bagatelle or Pigeonhole' as used in this article, shall mean a game played with any number of balls or spheres upon a table or board having holes, pockets or cups into which such balls or spheres may drop or become lodged and having arches, pins, and springs, or any of them, to control, deflect or impede the direction or speed of the balls or spheres put in motion by the player, and shall include the modern variety of Bagatelle or Pigeonhole commonly known as pin games." The ordinance then defines a "place of public resort" and in the instant case there is no contention that the two places mentioned in the bill where the devices are located, are not places of public resort. The ordinance further provides that whoever violates this provision shall be fined not less than $10 nor more than $200 for each offense and it is made the duty of every policeman who sees any table or implement kept or used in violation of the ordinance, to seize it and upon conviction of the keeper thereof, such table or implement so seized shall be destroyed.

The other ordinance mentioned in the complaint provides, "Automatic amusement devices prohibited. It shall be unlawful for any person, firm or corporation to keep, or cause any of his or its agents or employees to keep, for gain or profit, from operation, any amusement device the operation of which is governed or controlled by the deposit of a coin or token."

Counsel for plaintiffs in their brief say that, "Upon appeal from an order granting an interlocutory injunction where no answer has been filed, all allegations of the complaint well pleaded are

ordinances are advertised and made a part of the complaint. The "Bagatelle and Pigeon Hole" ordinance provides, inter alia, that:

"It shall be unlawful for any person to keep or use in any place of public resort within the city of Chicago any tables or implements for any game of bagatelle or pigeonhole.

"The term 'bagatelle or pigeonhole' as used in this article, shall mean a game played with any number of balls or spheres upon a table or board having holes, pockets or cups into which such balls or spheres may drop or become lodged and having arches, pins, and springs, or any of them, to control, deflect or impede the direction or speed of the balls or spheres put in motion by the player, and shall include the modern variety of bagatelle or Pigeon-hole commonly known as pin games." The ordinance then defines a "place of public resort" and in the instant case there is no controversy that the two places mentioned in the bill where the devices are located, are not places of public resort. The ordinance further provides that whoever violates this provision shall be fined not less than $10 nor more than $200 for each offense and it is made the duty of every policeman who sees any table or implement kept or used in violation of the ordinance, to seize it and upon conviction of the keeper thereof, such table or implement so seized shall be destroyed.

The other ordinance mentioned in the complaint provides, "Automatic amusement devices prohibited. It shall be unlawful for any person, firm or corporation to keep, or cause any of his or its agents or employees to keep, for gain or profit, from operation, any amusement device the operation of which is governed or controlled by the deposit of a coin or token."

Counsel for plaintiffs in their brief say that, "Upon appeal from an order granting or interlocutory injunction where no answer has been filed, all allegations of the complaint well pleaded are

taken as true, and the reviewing court will not pass upon the sufficiency of the complaint or the merits of the case, but if the complaint presents circumstances showing that plaintiff will probably be entitled to relief, the temporary injunction will not be disturbed." In support of this, counsel cite a number of cases decided by this court and by our Supreme court; but in none of them was an injunction sought to prevent officials from enforcing an ordinance of a municipality. In McDougall v. Woods, 247 Ill. App., 170, which was an appeal from an interlocutory order appointing a receiver and granting a temporary injunction upon the recommendation of a master in chancery, we said (p. 172): "In appeals from interlocutory orders it is not our province to determine the rights of the parties in the subject matter of the litigation, but simply to determine from the averments of the bill whether the party probably is entitled to the relief sought." For the purpose of this decision we shall assume the proposition advanced by counsel for plaintiffs is applicable here.

Defendants predicate the authority of the City Council of Chicago to pass the ordinance in question by virtue of Sec. 44, Art. 5, chap. 24, Ill. Rev. Stats., 1937. By article 5 and sec. 44 of that article, city councils are given the power "To license, regulate, tax or prohibit and suppress billiard, bagatelle, pigeonhole, or any other tables or implements kept or used for a similar purpose in any place of public resort, pin alleys and ball alleys." By Sec. 1949a of the ordinance in question it was made unlawful for anyone to keep or use in a place of public resort within the city, "any tables or implements for any game of bagatelle or pigeonhole", and those terms were defined by the ordinance to mean, "a game played with any number of balls or spheres upon a table or board having holes, pockets or cups into which such balls or spheres may drop or become lodged and having arches, pins, and springs, or any of them, to control, deflect or impede the direction or speed of

taken as true, and the reviewing court will not pass upon the authority of the complaint or the merits of the case, but if the complaint presents circumstances showing that plaintiff will probably be entitled to relief, the temporary injunction will not be disturbed." In support of this, counsel cite a number of cases decided by this court and by our appellate courts; but in none of them was an injunction sought to prevent officials from enforcing an ordinance of a municipality. In McDougall v. Woods, 347 Ill. App., 170, which was an appeal from an interlocutory order sustaining a receiver and granting a temporary injunction upon the recommendation of a master in chancery, we said (p. 172): "In appeals from interlocutory orders it is not our province to determine the rights of the parties in the subject matter of the litigation, but simply to determine from the averments of the bill whether the party probably is entitled to the relief sought." For the purpose of this decision we shall assume the proposition advanced by counsel for appellants is applicable here.

Defendants predicate the authority of the City Council of Chicago to pass the ordinance in question by virtue of Sec. 44, Art. 5, chap. 24, Ill. Rev. Stats., 1937. By article 5 and sec. 44 of that article, city councils are given the power "to license, regulate, tax or prohibit and suppress billiard, bagatelle, pigeon-hole, or any other tables or implements kept or used for a similar purpose in any place of public resort, pin alleys and ball alleys." By Sec. 1949a of the ordinance in question it was made unlawful for anyone to keep or use in a place of public resort within the city, "any tables or implements for any game of bagatelle or pigeonhole", and those terms were defined by the ordinance to mean, "a game played with any number of balls or spheres upon a table or board having holes, pockets or cups into which such balls or spheres may drop or become lodged and having springs, pins, and springs, or any of them, to control, deflect or impede the direction or speed of

the balls * * * and shall include the modern variety of Bagatelle or Pigeonhole" known as pin games.

Plaintiffs contend (1) that the two devices in question do not come within the perview of the Bagatelle or Pigeonhole ordinance; (2) that the ordinance is void as being beyond the power conferred upon City Councils; (3) that the ordinance is unconstitutional because it attempts to create an arbitrary discrimination between bagatelle and pigeon hole games and other games of the same class, in violation of the 14th Amendment of the United States Constitution and of Art. 2, sec. 2, and art. 4, sec. 22 of the Constitution of Illinois; and (4) that it is unconstitutional because it deprives plaintiffs of private property without due process, in violation of the United States and Illinois Constitutions.

(1) It is said that the device "Magic Roll" has no holes, pockets or cups into which the balls may drop or become lodged; that neither of the devices has arches, pins or springs to control, deflect or impede the direction or speed of balls and that neither of them is a "pin game." We think this contention cannot be sustained. The Statute, sec. 44, art. 5, chap. 24, authorizes City councils to regulate or prohibit billiards, bagatelle, pigeon hole, "or any other tables or implemenets kept or used for a similar purpose in any place of public resort." These specifications of what may be regulated or prohibited by ordinance are not all inclusive, because City councils are authorized not only to regulate or prohibit the matters specifically mentioned in the section, but also "any other tables or implements kept or used for similar purposes." We think the devices in question may properly be held to fall within the classification, "tables or other implements used for a similar purpose." City of Chicago v. Ben Alpert, Inc., 368 Ill., 282. In that case is was held that the statute which authorizes cities to direct the location and to regulate the use and construction of

garages was a valid exercise of the police power, and that under such a statute the City had power to pass an ordinance to regulate the public garage business and to impose an inspection or license fee for the purpose of rendering such inspection valid. And that the ordinance which described a public garage "as 'any building, structure, premises, enclosure, or other place'*** within the city, where two or more automobiles are stored or parked," included the parking of automobiles on a vacant lot or open space for hire. It was there contended that a vacant lot was not a garage, but the Supreme court said the contention could not be sustained. The court said (p. 286): "The General Assembly, in the quoted delegation of power, did not define 'garages' thereby limiting the authority delegated by making the word 'garages' a static or dormant concept rendering cities impotent to cope with the overchanging conditions of a mobile and complex society. In short, cities and villages are not restricted, in directing the location and regulating the use and construction of garages, to such premises as may have conformed to the accepted popular definition of the word 'garage' in 1911, when it was incorporated in the statute. Conditions attending the storage and parking of automobiles in metropolitan areas today are vastly different from those prevailing a quarter of a century ago when the State empowered cities to regulate and license garages.*** The express power to regulate the use and construction of garages is sufficiently comprehensive to authorize cities and villages to license open-air as well as closed public garages. A legitimate exercise of this power is immune from constitutional assault."

(2) From what we have said we think it follows that under the provisions of sec. 44, art. 5, of the Cities and Villages Act, power was conferred on the City of Chicago to enact the ordinance in question. The two devices and the games to be played by the use of them are sufficiently similar to those mentioned in the section to fall within its provisions. Although the games in

garages was a valid exercise of the police power, and that under such a statute the City had power to pass an ordinance to regulate the public garage business and to impose an inspection or license fee for the purpose of rendering such inspection valid. And that the ordinance which described a public garage "as 'any building, structure, premises, enclosure, or other place*** within the city, where two or more automobiles are stored or parked," included the parking of automobiles on a vacant lot or open space for hire. It was there contended that a vacant lot was not a garage, but the Supreme court said the contention could not be sustained. The court said (p. 286): "The General Assembly, in the quoted delegation of power, did not define 'garages' thereby limiting the authority delegated by making the word 'garages' a static or fixed concept rendering it impotent to cope with the ever-changing conditions of a mobile and complex society. In short, cities and villages are not restricted, in directing the location and regulating the use and construction of garages, to such premises as may have conformed to the accepted popular definition of the word 'garage' in 1911, when it was incorporated in the statute. Conditions attending the storage and parking of automobiles in metropolitan areas today are vastly different from those prevailing a quarter of a century ago when the State empowered cities to regulate and license garages.*** The express power to regulate the use and construction of garages is sufficiently comprehensive to authorize cities and villages to license open-air as well as closed public garages. A legitimate exercise of this power is immune from constitutional assault."

(c) From what we have said we think it follows that under the provisions of sec. 44, art. 5, of the Cities and Villages Act, power was conferred on the City of Chicago to enact the ordinance in question. The two devices and the means to be played by the use of them are sufficiently similar to those mentioned in the section to fall within its provisions. Although the games in

question are not played with a cue, we think the difference in the manner of playing the games is not of controlling importance.

(3) Counsel for plaintiffs further contend that if it should be held that the City council had not exceeded the powers granted it by the Statute in enacting the ordinance, it must be held that the ordinance is invalid as an unconstitutional exercise of power granted to the City, because the ordinance makes an arbitrary classification in that it prevents the playing of games by the use of the two devices in question, but does not prohibit the playing of billiards, bagatelle, pigeon hole, etc. In Village of Atwood v. Otter, 296 Ill. 70, the court held that an ordinance passed by the village officials which prohibited the playing of billiards and pool, was authorized under sec. 44 of art. 5, which we have quoted. We must construe the law as we find it. We have nothing to do with the wisdom or unwisdom of the act of the legislature or of an ordinance. Courts have one function, the legislative bodies another. We think it cannot be said that the ordinance is so arbitrary as to make it invalid. And the fact, if it be a fact, that the City has not prohibited the playing of other games as they might by ordinance do under the authority granted by sec. 44, does not make the ordinance so unreasonable as to render it invalid. The ordinance includes certain tables or implements which the City council had the power to prohibit the use of in the playing of games, and the fact that it did not exercise all the power granted to it cannot be availed of byplaintiffs to their advantage here. People v. Callicott, 322 Ill., 390; Holzman v. City of Canton, 180 Ill. App., 641; Goodrich v. Busse, 247 Ill., 366; City of Chicago v. Rhine, 363 Ill. 619; McGrath v. City of Chicago, 309 Ill.,515.

In the last cited case the court held the provision of an ordinance defining furniture movers as those operating vehicles having an inside floor measure of 45 square feet or more, was not

question are not played with a cue, we think the difference in the manner of playing the games is not of controlling importance.

(3) Counsel for plaintiffs further contend that it should be held that the City Council had not exceeded the power granted it by the statute in enacting the ordinance. It must be held that the ordinance is invalid as an abuse institutional exercise of power granted to the City, because the ordinance makes an arbitrary classification in that it prevents the playing of games by the use of two devices in question, but does not prohibit the playing of billiards, bagatelle, pigeon hole, etc. In Village of Atwood v. Cutler, 295 Ill. 70, the court held that an ordinance passed by the village officials which prohibited the playing of billiards and pool, was authorized under sec. 44 of art. 5, which we have quoted. The most consistent law can be find in. We have nothing to do with the wisdom or unwisdom of the act of the legislature or of an ordinance. Courts have one function, the legislative action another. We think it cannot be said that the ordinance is so arbitrary as to make it invalid. And the fact, if it be a fact, that the City has not prohibited the playing of other games as they might by ordinance do under the authority granted by sec. 44, does not make the ordinance so unreasonable as to render it invalid. The ordinance indicates certain tables or implements which the City council had the power to prohibit the use of in the playing of games, and the fact that it did not exercise all the power granted to it cannot be evidence of hostility to their advantage here. People v. Wilhoit, 328 Ill., 200; Rolmer v. City of Chicago, 149 Ill. 456, 461; Goodrich v. Gross, 247 Ill., 366; City of Chicago v. Rhine, 263 Ill. 216; Sorkin v. City of Chicago, 269 Ill., 212.

In the last cited case the court held the provision of an ordinance defining Turkish saunas as those operating vehicles having an inside floor measure of 15 square feet or more, was not

invalid in not applying to carters using small vehicles. The court there, in announcing the principle of law involved, said (p. 517):: "It is well established that the question of making classifications for the purpose of enacting laws over matters within its jurisdiction is primarily for the legislative department, and it can become a judicial question only when the action of the law-making body is clearly unreasonable, arbitrary and discriminatory. Before a court can interfere with the legislative judgment it must be able to say that there is no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched." In the instant case, we think there is no unreasonable classification.

(4) In support of the contention that the ordinance deprives plaintiffs of private property without due process, counsel cite City of Chicago v. Drake Hotel Co., 274 Ill. 408, and other cases. In that case it was held that an ordinance of the City which sought to prohibit dancing in a restaurant while it was open for r4freshments unless a fee was charged, was invalid because the legislature had not the power to confer upon municipalities authority to prohibit amusements which did not come within the legitimate power of the police power. In that case suit was instituted in the Municipal court of Chicago to recover a penalty for the violation of the ordinance. A hearing was had upon the defendant's motion to strike plaintiff's statement of claim on the ground that it did not state a cause of action. Upon the hearing of the motion it was stipulated that the motion be treated as a motion by the defendant at the close of all the evidence to direct a verdict in its favor, and the following stipulation was signed by the parties: "It is hereby stipulated and agreed by and between the parties hereto, ** that the defendant ** is the manager of a restaurant and permits its patrons to indulge in dancing while the ** restaurant is open to the general public; that ** defendant charges no admission fee of any

invalid in not applying to carters using small vehicles. The court there, in announcing the principle of law involved, said (p. 417):: "It is well established that the question of making classifications for the purpose of enacting laws over matters within its jurisdiction is primarily for the legislative department, and it can become a judicial question only when the action of the law-making body is clearly unreasonable, arbitrary and discriminatory. Before a court can interfere with the legislative judgment it must be able to say that there is no fair reason for the law that would not require with equal force the extension to others upon it leaves untouched." In the instant case, we think there is no unreasonable classification.

(4) In support of the contention that the ordinance deprives plaintiffs of private property without due process, counsel cite City of Chicago v. Drake Hotel Co., 274 Ill. 408, and other cases. In that case it was held that an ordinance of the city which sought to prohibit dancing in a restaurant unless it was open for refreshments unless a fee was charged, was invalid because the legislature had not the power to confer upon municipalities authority to prohibit amusements which did not come within the legitimate power of the police power. In that case suit was instituted in the Municipal court of Chicago to recover a penalty for the violation of the ordinance. A hearing was had upon the defendant's motion to strike plaintiff's statement of claim on the ground that it did not state a cause of action. Upon the hearing of the motion it was stipulated that the motion be treated as a motion by the defendant at the close of all the evidence to direct a verdict in its favor, and the following stipulation was signed by the parties: "It is hereby stipulated and agreed by and between the parties hereto, ** that the defendant ** is the manager of a restaurant and permits its patrons to indulge in dancing while the ** restaurant is open to the general public; that ** defendant charges no admission fee of any

kind to its said restaurant and none for the privilege of dancing; * * *"that the dancing permitted * * * has been and is orderly, dignified, quiet, respectable, decent and peaceful and in no sense injurious to the public morals, welfare or health and in no sense is a public nuisance." The court held the statement of claim insufficient, entered judgment accordingly, and the City prosecuted a writ of error to the Supreme court. The court said the only question was whether the City posessed the power to pass the ordinance which defendant was charged with violating. The statute involved was sec. 41, article 5, of the Cities and Villages act, which confers on City Councils the power "To license, tax, regulate, suppress or prohibit *** theatricals and other exhibitions, shows and amusements." The court said that the ordinance related only to amusements "'offered, operated, presented or exhibited for gain or for admission to which the public is required to pay a fee,' and does not apply to amusements where the public is not required to pay any fee or compensation." Continuing the court said (p. 412): "The matter here presented for determination, therefore, resolves itself into the question whether the city council of the City of Chicago has the power to prohibit dancing in restaurents by the patrons thereof where no fee is charged for the privilege. The question whether the city council has the power to regulate dancing in such restaurants is not presented.

"For the purpose of this decision it may be conceded that the legislature has by clause 41 *** attempted to confer upon the city council the power to prohibit amusements and that dancing is one of such amusements. The legislature, however, could confer upon the city council no greater power than the legislature itself possessed, and we have recently held that 'the legislature had not the power to pass an act prohibiting all amusements, but only such as came within the legitimate exercise of the police power.'"

kind to its said restaurant and made for the privilege of dancing;

* * *"that the dancing permitted * * * has been and is orderly, dignified, quiet, respectable, moral and peaceful and in no sense injurious to the public morals, welfare or health and is in no sense is a public nuisance." The court held the statement of claim insufficient, entered judgment accordingly, and the city prosecuted a writ of error to the Supreme court. The court said the only question was whether the City possessed the power to pass the ordinance with defendant was charged with violating. The statute involved was sec. 41, article 5, of the cities and villages act, which confers on city councils the power "to license, tax, regulate, suppress or prohibit *** theatricals and other exhibitions, shows and amusements." The court said that the ordinance referred only to amusements "'altered, conducted, presented or exhibited for gain or for admission to which the public is required to pay a fee,' and does not apply to amusements where the public is not required to pay any fee or compensation." Continuing the court said (p. 412): "The matter here presented for determination, therefore, resolves itself into the question whether the city council of the City of Chicago has the power to prohibit dancing in restaurants by the patrons thereof where no fee is charged for the privilege. The question whether the city council has the power to prohibit dancing in such restaurants is not presented.

"For the purpose of this decision it may be conceded that the legislature has by clause 41 *** attempted to confer upon the city council the power to prohibit amusements and that dancing is one of such amusements. The legislature, however, could confer upon the city council no greater power than the legislature itself possessed, and we have recently held that 'the legislature had not the power to pass an act prohibiting all amusements, but only such as come within the legitimate exercise of the police power.'"

(p. 413): "There is nothing necessarily harmful in permitting the patrons of a restaurant to dance while the restaurant is open to the general public as a place where the public may purchase refreshments. On the contrary, the evidence here shows, and the municipal court found, that dancing as conducted *** always has been and is 'orderly, dignified, quiet, respectable, decent and peaceful' and in no sense was or is a public nuisance, and was and is a reasonable and harmless method of amusement for the public in said city. Because the privilege may be abused is no reason why it shall be denied."

In the instant case there is no showing by allegation or otherwise that the operation of the two devices in question is "in no sense injurious to the public morals, welfare or health and in no sense is a public nuisance," as was the fact in the Drake Hotel case. Whether such facts may be adduced on the hearing, obviously is not before us. In these circumstances we cannotsay that the action of the City council in passing the ordinance was so arbitrary, capricious and unreasonable as to warrant us in holding the ordinance invalid.

Plaintiffs further contend that the ordinance which prohibits the operation of an amusement device which is controlled by the deposit of a coin is invalid, because it creates an arbitrary discrimination between those devices operated by a coin and those not so operated, deprives plaintiffs of their property without due process and is beyond the legitimate exercise of police power. We have above quoted the applicable section of the ordinance on amusement devices. The source of the City's power to enact the ordinance is claimed by virtue of secs. 41 and 58 of art. 5, chap. 24, Ill. Rev. Stats. 1937. By sec. 41 City councils are empowered to license, tax, regulate, suppress, etc., "shows and amusements" and to revoke such licenses at pleasure. And by sec. 58, "to regulate places of amusement." And counsel for plaintiffs point out that in Condon v. Village of

(p. 412): "There is nothing necessarily hurtful in permitting the patrons of a restaurant to dance while the restaurant is open to the general public as a place where the public may purchase refreshments. On the contrary, the evidence here shows, and the municipal court found, that dancing as conducted was always has been and is 'orderly, dignified, quiet, respectable, decent and peaceful' and in no sense was or is a public nuisance, and was and is a reasonable and harmless method of amusement for the public in said city. Because the privilege may be abused is no reason why it shall be denied."

In the instant case there is no showing by allegation or otherwise that the operation of the two devices in question is "in no sense injurious to the public morals, welfare or health and in no sense is a public nuisance," as was the fact in the Drake Hotel case. Whether such facts may be adduced on the trial, obviously is not before us. In these circumstances we cannot say that the action of the City council in passing the ordinance was so arbitrary, capricious and unreasonable as to warrant us in holding the ordinance invalid.

Plaintiffs further contend that the ordinance which prohibits the operation of an amusement device which is controlled by the deposit of a coin is invalid, because it creates an arbitrary discrimination between these devices operated by a coin and those not so operated, deprives plaintiffs of their property without due process and is beyond the legitimate exercise of police power. We have above quoted the applicable section of the ordinance on amusement devices. The source of the City's power to enact the ordinance is claimed by virtue of secs. 41 and 52 of art. 5, chap. 24, Ill. Rev. Stats. 1937. By sec. 41 city councils are empowered to license, tax, regulate, suppress, etc., "shows and amusements" and to revoke such licenses at pleasure. And by sec. 52, "to regulate places of amusement." And counsel for plaintiffs point out that in Gordon v. Village of

Forest Park, 278 Ill., 218, it was held that an ordinance of the village which prohibited the conduct of a golf course without a license, to which an admission was charged, was invalid for want of power, and that "Golf *** and other like games bear no likeness to public shows and amusements of the same nature as theatricals, and therefore it cannot be said that the legislative intent was to include" golf "as subjects or objects of taxation." Counsel further say that "'Magic Roll' and 'Skill Roll' by no stretch of the immagination can be called gambling devices", citing Question Game Co., Inc. v. Ploner, 273 Ill. App. 187. While counsel for defendant say "the contraptions of plaintiffs serve no useful purpose, but stimulate and encourage gambling, and are readily adapted for the giving of prizes. To promote the general welfare, and under its general police powers the City Council is not impotent to deal with these devices which entice children and weak-minded adults to gaming and the squandering of their money.

"Failure to enforce an ordinance against all persons affected by it does not invalidate the ordinance." And counsel contend that both devices come squarely within the provisions of sec. 1893a of the ordinance. On this record we are unable to say that because the two devices require the placing of a coin in the slot to obtain the 9 balls rather than to have the player obtain the balls by giving a coin to an employee of plaintiffs, the ordinance is violated; on the contrary, we think that if such a construction were placed upon it, the ordinance would be unreasonable and invalid.. While it may be that the operation of the two devices may stimulate and encourage gambling and induce children and weak-minded adults to gamble and squander their money, in which view, obviously, the ordinance as well as the criminal laws would be violated, yet we think any facts bearing on such questions should be left to a hearing of the case on its merits. Police and officials and other city officials ought not to be enjoined from enforcing city ordinances except in a clear case.

We think the order appealed from was improvidently entered and it is reversed.

ORDER REVERSED.

McSurely, P. J., and Matchett, J., concur.

Forest Park, 273 Ill., 213, it was held that an ordinance of the village which prohibited the conduct of a golf course without a license, to which an admission was charged, was invalid for want of power, and that "golf *** and other like games want no licensee to public shows and amusements of the same nature as theatricals, and therefore it cannot be said that the legislative intent was to include 'golf as subjects or objects of taxation.'" Counsel further say that "Bagio Roll' and 'Skill Roll' by no stretch of the imagination can be called gambling devices", citing Peoples Gas Co., Inc. v. Hoyer, 273 Ill. App. 187. While counsel for defendant say "the contentions of plaintiffs serve no useful purpose, but stimulate and encourage gambling, and are readily adapted for the giving of prizes. To promote the general welfare, and under its general police powers the City Council is not impotent to deal with these devices which entice children and weak-minded adults to gaming and the squandering of their money.

"Failure to enforce an ordinance against all persons affected by it does not invalidate the ordinance." And counsel contend that both devices come squarely within the provisions of sec. 1 of the ordinance. On this record we are unable to say that because the two devices require the placing of a coin in the slot to obtain the 9 balls rather than to have the player obtain the balls by giving a coin to an employee of plaintiffs, the ordinance is violated; on the contrary, we think that if such a construction were placed upon it, the ordinance would be unconstitutional and invalid. While it may be that the operation of the two devices can stimulate and encourage gambling and induce children and weak-minded adults to gamble and squander their money, in this view, obviously, the problem is well as the criminal laws would be violated, yet we think any facts bearing on such questions should be left to a hearing of the case on its merits. Police and officials and other city officials cannot not to be enjoined from enforcing city ordinances except in a clear case.

We think the order appealed from was improvidently entered and it is reversed.

ORDER REVERSED.

McGuire, P. J., and Hatchett, J., concur.

40401

CHICAGO TITLE AND TRUST COMPANY, a Corporation, as Trustee, Appellee,

vs.

FRANK F. HENSE et al.,

Appeal of HAROLD LEDERER, LEON LEDERER and ELLEN LEDERER, as Trustees, certain defendants, Appellants.

INTERLOCUTORY APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

296 I.A. 645

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an interlocutory appeal by certain defendants from an order appointing a receiver in a foreclosure suit.

The appointment was made upon a verified complaint of the plaintiff which stated that on February 1, 1927, one Frank Hense, being indebted in the principal sum of $210,000, executed his bonds for this amount and a deed of trust conveying certain premises; that $40,000 of said principal indebtedness has been paid; that there is default in the payment of the principal sum of $10,000 which matured August 1, 1932, also interest coupons becoming due February 1, 1932, and that since August 1, 1931, no part or portion of said outstanding bonds or of the interest since August 1, 1931, has been paid; that there is due under the terms of the trust deed $170,000; that the value of the premises does not exceed the sum of $135,000; the mortgaged premises are located at the southwest corner of Devon and Claremont avenues in Chicago and improved with a two story and basement brick store and office building containing ten stores and a number of offices. The complaint asserted that the premises were scant security for the unpaid indebtedness; that a personal decree against the person liable would be unavailing and futile; that the record title to the property is held by Herman Thurow, Harold Lederer, Leon Lederer and Ellen Lederer as trustees. The trust

CHICAGO TITLE AND TRUST COMPANY,
a Corporation, as Trustee,
Appellee,

vs.

FRANK T. HERMAN et al.,

Appeal of HAROLD LEDERER, LEON LEDERER and HILLEN LEDERER, as Trustees, certain defendants,
Appellants.

INTERLOCUTORY APPEAL FROM
CIRCUIT COURT OF COOK COUNTY.

296 I.A. 645

MR. PRESIDING JUSTICE MCSURELY
DELIVERED THE OPINION OF THE COURT.

This is an interlocutory appeal by certain defendants from an order appointing a receiver in a foreclosure suit.

The appointment was made upon a verified complaint of the plaintiff which stated that on February 1, 1927, one Frank Herman, being indebted in the principal sum of $210,000, executed his bonds for this amount and a deed of trust conveying certain premises; that $40,000 of said principal indebtedness has been paid; that there is default in the payment of the principal sum of $10,000 which matured August 1, 1932, also interest coupons becoming due February 1, 1932, and that since August 1, 1931, no part of principal of said outstanding bonds or of the interest since August 1, 1931, has been paid; that there is due under the terms of the trust deed $170,000; that the value of the premises does not exceed the sum of $135,000; the mortgaged premises are located at the southwest corner of Devon and Clarendon avenues in Chicago and improved with a two story and basement brick store and office building containing ten stores and a number of offices. The complaint asserted that the premises were scant security for the unpaid indebtedness; that a personal decree against the person liable would be unavailing and futile; that the record title to the property is held by Herman Thurow, Harold Lederer, Leon Lederer and Hillen Lederer as trustees. The trust

deed conveyed the rents and profits and also provided that a receiver might be appointed with power to collect the rents.

The verified complaint presented a typical case for the appointment of a receiver and there was no abuse of judicial discretion in making such an appointment. Redington v. Craig, 270 Ill. App. 163; Frank v. Siegel, 263 Ill. App., 316; Chicago Title & Trust Co. v. Mack, 347 Ill. 480; Haas v. Chicago Building Society, 89 Ill. 498; Bagley v. Illinois Tr. & Sav. Bank, 199 Ill. 76.

Upon notice for an appointment of a receiver the owners of the title filed an appearance and made a counter motion that they be allowed to retain possession of the premises upon giving bond with such penalty and security and such condition as the court may order under the statute, which is as follows:

> "On an application for the appointment of a receiver, the court or judge may, in lieu of appointing a receiver, permit the party in possession to retain such possession upon giving bond with such penalty and with such security and upon such condition as the court or judge may order and approve; and the court may remove a receiver and restore the property to the possession of the party from whom it was taken upon the giving of a like bond." (Ill. Rev. Stats., 1937, chap. 22, par. 55.)

Defendants seem to assert that under the statute it was mandatory upon the chancellor to permit the defendants in possession to continue in lieu of appointing a receiver. Manifestly it was within the discretion of the chancellor, in lieu of appointing a receiver, to permit the party in possession to retain possession under certain conditions, and the statute is merely permissive and not mandatory. It was so held in Kelly v. Marks, 267 Ill. App., 199, 209.

When defendants requested the court to continue them in possession, offering to put up a bond as security, they virtually admitted the necessity that the court should take custody and possession of the premises. A similar condition appeared in State Bank & Trust Co. v. Massion, 279 Ill. App., 234, 240-41, where we

deed conveyed the rents and profits and also provided that a receiver might be appointed with power to collect the rents.

The verified complaint presented a typical case for the appointment of a receiver and there was no abuse of judicial discretion in making such an appointment. Hodinston v. Grace, 270 Ill. App. 163; Frank v. Siegel, 203 Ill. App., 316; Chicago Title & Trust Co. v. Kook, 347 Ill. 460; Hess v. Chicago Building Society, 89 Ill. 498; Bagley v. Illinois Tr. & Sav. Bank, 199 Ill. 76.

Upon notice for an appointment of a receiver the owners of the title filed an appearance and made a counter motion that they be allowed to retain possession of the premises upon giving bond with such penalty and security and upon such condition as the court may order under the statute, which is as follows:

> "On an application for the appointment of a receiver, the court or judge may, in lieu of appointing a receiver, permit the party in possession to retain such possession upon giving bond with such penalty and with such security and upon such condition as the court or judge may order and approve; and the court may remove a receiver and restore the property to the possession of the party from whom it was taken upon the giving of a like bond." (Ill. Rev. Stats., 1937, Chap. 22, par. 35.)

Defendants seek to assert that under the statute it was mandatory upon the chancellor to permit the defendants in possession to continue in lieu of appointing a receiver. Admittedly it was within the discretion of the chancellor, in lieu of appointing a receiver, to permit the party in possession to retain possession under certain conditions, and the statute is merely permissive and not mandatory. It was so held in Kelly v. Marks, 207 Ill. App., 199, 204.

When defendants requested the court to continue them in possession, offering to put up a bond as security, they virtually admitted the necessity that the court should take custody and possession of the premises. A similar contention appeared in State Bank & Trust Co. v. Hanson, 279 Ill. App., 254, 240-41, where we

noted that the defendant, who had been permitted to operate the building in lieu of a receiver, virtually admitted the necessity for the appointment of a receiver.

We are of the opinion a proper showing was made in the instant case for the appointment of a receiver and the order is affirmed.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

noted that the defendant, who had been permitted to operate the building in lieu of a receiver, virtually admitted the necessity for the appointment of a receiver.

We are of the opinion a proper showing was made in the instant case for the appointment of a receiver and the order is affirmed.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

39615

BERT C. ROACH, Receiver of the FIRST AMERICAN NATIONAL BANK & TRUST COMPANY OF BERWYN, a National Banking Association,

Appellant,

v.

ROSE KOUBA, a Spinster, FIRST NATIONAL BANK OF BERWYN, a Banking Corporation, as Trustee under the provisions of a Trust Agreement recorded as Document No. 10656687, MARY KVIDERA, EDWARD KVIDERA, JACOB CEJKA, CHRISTY CEJKA, WILLIAM K. PFLAUM, OTTO CEJKA, as Trustee under Document recorded as No. 9881164, WILL H. WADE, as Receiver of Millard State Bank, a Corporation, and "UNKNOWN OWNERS,"

Appellees.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

296 I.A. 645

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff filed a complaint to foreclose a trust deed conveying real estate to secure an indebtedness of $7,500; Edward Kvidera, one of the defendants, filed an answer asserting that he was the owner of a half interest in the premises; that title to the premises was held by Rose Kouba in trust for himself and certain other parties; that she obtained the loan in question and executed the note and trust deed conveying the entire premises without the knowledge of the defendant Kvidera; upon discovering that the trust deed covered the entire premises he conferred with the officers of the bank making the loan and was advised that inadvertently the entire property was described in the trust deed, whereas it was intended to convey an undivided half interest in the real estate belonging to certain other parties.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY,

MR. PRESIDING JUSTICE MCGURN
DELIVERED THE OPINION OF THE COURT.

Plaintiff filed a complaint to foreclose a trust deed conveying real estate to secure an indebtedness of $7,500; Edward Kvidera, one of the defendants, filed an answer asserting that he was the owner of a half interest in the premises; that title to the premises was held by Rose Kouba in trust for himself and certain other parties; that she obtained the loan in question and executed the note and trust deed conveying the entire premises without the knowledge of the defendant Kvidera; upon discovering that the trust deed covered the entire premises he conferred with the officers of the bank making the loan and was advised that inadvertently the entire property was described in the trust deed, whereas it was intended to convey an undivided half interest in the real estate belonging to certain other parties.

The cause was referred to a master who, after taking testimony, reported finding that Rose Kouba, the mortgagor, was the record owner of the legal title to the premises when on December 16, 1927, she executed the note and trust deed, and that the officers of the lending bank had no notice or knowledge of any interest of defendant Kvidera in the premises. Subsequent to making the mortgage a document was presented to the vice-president and cashier of the lending bank setting forth that the owners of the real estate were, Edward Kvidera - 1/2 interest, Jacob Cejka - 1/4 interest, and William K. Pflaum - 1/4 interest. The officer of the bank on examining the document and finding that it contained an acknowledgment on the part of the bank that the trust deed in question was not intended to cover the interest of Kvidera, refused to execute it and destroyed it.

The master found that there was nothing in the record giving rise to any equities in favor of defendant Kvidera as against the trust deed, and that his action in causing the legal title to the premises to be placed in the name of Rose Kouba, thus clothing her with every indicia of title to the entire premises, operated to defeat his contention that the lien of the trust deed executed by her on December 16, 1927, ought not to cover his interest in the premises; that the officers of the lending bank were ignorant of Kvidera's interest in the premises at the time of the execution of the trust deed. The master found the equities with the plaintiff; that the trust deed was a valid lien on the whole of the real estate described in the trust deed, including the interest of Kvidera, and recommended a decree accordingly.

Exceptions were filed to the report, which the chancellor sustained and found with Kvidera and entered a decree finding there was due plaintiff $7,403.29, with interest, but that plaintiff was

The cause was referred to a master who, after taking testimony, reported finding that Rose Kondo, the mortgagor, was the record owner of the legal title to the premises when on December 16, 1927, she executed the note and trust deed, and that the officers of the lending bank had no notice or knowledge of any interest of defendant Kondo in the premises. Subsequent to making the mortgage a document was presented to the vice-president and cashier of the lending bank setting forth that the owners of the real estate were, Edward Kondo - 1/2 interest, Jacob Kondo - 1/4 interest, and William Kondo - 1/4 interest. The officer of the bank on examining the document and finding that it contained an acknowledgment on the part of the bank that the trust deed in question was not intended to cover the interest of Kondo, returned to executor it and destroyed it.

The master found that there was nothing in the record giving rise to any equities in favor of defendant Kondo as against the trust deed, and that his action in claiming the legal title to the premises to be placed in the name of Rose Kondo, thus clothing her with every indicia of title to the entire premises, operated to defeat his contention that the lien of the trust deed executed by her on December 16, 1927, ought not to cover his interest in the premises; that the officers of the lending bank were ignorant of Kondo's interest in the premises at the time of the execution of the trust deed. The master found the equities with the plaintiff; that the trust deed was a valid lien on the whole of the real estate described in the trust deed, including the interest of Kondo, and recommended a decree accordingly.

Exceptions were filed to the report, which the chancellor sustained and found with Kondo and entered a decree finding there was due plaintiff $7,405.29, with interest, but that plaintiff was

entitled to a lien on only an undivided half of the real estate described in the trust deed and directed this to be sold. Plaintiff appeals from this decree.

We are of the opinion the exceptions should have been overruled and a decree entered as recommended by the master.

Rose Kouba, an unmarried woman, a sister-in-law of defendant Pflaum, was employed by Pflaum and Cejka as bookkeeper and did general office work in their real estate business; the real estate in question was bought in 1925 by her employers and defendant Kvidera who is in the furniture business; the consideration was $20,000; $10,000 was paid in cash, $5,000 of which was contributed by Kvidera and $5,000 furnished jointly by Pflaum and Cejka; they had the legal title placed in Rose Kouba who gave a mortgage for approximately $10,000 for the balance of the purchase price; in December, 1927, this became due and Rose Kouba borrowed $5,500 from the First National Bank of Berwyn upon her collateral note and as security executed and delivered to this bank her principal note in the sum of $7,500 with the instant trust deed conveying the entire premises in question.

Subsequently the First National Bank of Berwyn became consolidated with other banks, merging with the First American National Bank and Trust Company of Berwyn which on June 18, 1932, ceased to do business and a receiver took possession.

The $7,500 note dated December 16, 1927, matured three years after its date and Rose Kouba executed an extension agreement for three years.

The $5,500 loaned by the First National Bank of Berwyn was used in paying a preexisting mortgage on the property. The premises were vacant and the details of management were handled by Pflaum and Cejka.

Kvidera testified that he frequently ate luncheon and

entitled to a lien on only an undivided half of the real estate described in the trust deed and directed him to be sold. Plaintiff appeals from this decree.

We are of the opinion the exceptions should have been overruled and a decree entered as recommended by the master.

Rose Kouba, an unmarried woman, sister-in-law of defendant Illman, was employed by Illman and Geiza as bookkeeper and did general office work in their real estate business; the real estate in question was bought in 1929 by her employers and defendant Ayldere who is in the furniture business; the consideration was $20,000; $10,000 was paid in cash, $5,000 of which was contributed by Ayldere and $5,000 furnished jointly by Illman and Geiza; they had the legal title placed in Rose Kouba who gave a mortgage for approximately $10,000 for the balance of the purchase price; in December, 1929, this became due and Rose Kouba borrowed $5,500 from the First National Bank of Berwyn upon her collateral note and as security executed and delivered to this bank her principal note in the sum of $7,500 with the instant trust deed covering the entire premises in question.

Subsequently the First National Bank of Berwyn became consolidated with other banks, merging with the First Lexington National Bank and Trust Company of Berwyn which on June 14, 1932, ceased to do business and a receiver took possession.

The $7,500 note dated December 14, 1929, matured three years after its date and Rose Kouba executed an extension agreement for three years.

The $5,500 loaned by the First National Bank of Berwyn was used in paying a preexisting mortgage on the property. The premises were vacant and the details of management were handled by Illman and Geiza.

Ayldere testified that he frequently ate luncheon and

played cards with Mr. Krajic and Mr. Karel, officers of the First National Bank of Berwyn; that on frequent occasions he made reference to the fact that he was interested in these lots; when Mr. Krajic told him there was a mortgage on them he went to the bank and discussed it with the officers, who suggested that a trust agreement be drawn reciting that Kvidera was the owner of an undivided half interest clear of the mortgage. These officers both denied having any such conversation with Kvidera and testified that it was not until about two years after the loan was made that they knew that Kvidera claimed any interest in these lots, and Mr. Krajic testified that he first knew of Kvidera's claim of any interest in 1930 when the proposed trust agreement was submitted to him reciting the fact of Kvidera's ownership.

The record title to the property described in the trust deed stood in the name of Rose Kouba; she signed the trust deed warranting her right to convey. The property being vacant, an inspection would not disclose any claim of Kvidera's interest. It has been held many times that one dealing with real estate may rely upon the record. Robbins v. Moore, 129 Ill. 30, 43-4; Home Bank v. Peoria Trotting Society, 206 Ill. 9; Marsh v. Stover, 363 Ill. 490, 493, and many other cases.

Defendant Kvidera concedes that neither inspection of the records nor of the premises would have disclosed his interest but claims that notice of his interest was conveyed to the officers of the lending bank by certain desultory conversations with them while lunching or playing cards. Even if this were admitted, the conversations are not shown to have been at or near the time the mortgage was made nor in connection with any transaction concerning the property. The title of a purchaser placing his deed on record will not be defeated on the ground that he had notice of a prior unrecorded interest unless the proof of such notice is so clear

played cards with Mr. Kratjic and Mr. Ayres, officers of the First National Bank of Berwyn; that on frequent occasions he made reference to the fact that he was interested in these lots; when Mr. Kratjic told him there was a mortgage on them he went to the bank and discussed it with the officers, who suggested that a trust agreement be drawn recitING that Kvidera was the owner of an undivided half interest clear of the mortgage. These officers both denied having any such conversation with Kvidera and testified that it was not until two years after the loan was made that they knew that Kvidera claimed any interest in these lots, and Mr. Kratjic testified that he first knew of Kvidera's claim of any interest in 1930 when the proposed trust agreement was submitted to him recITING the fact of Kvidera's ownership.

The record title to the property described in the trust deed stood in the name of Jose Rosbo; she signed the trust deed warranting her right to convey. The property being vacant, an inspection would not disclose any claim of Kvidera's interest. It has been held many times that one dealing with real estate may rely upon the record. Robbins v. Moore, 147 Ill. 39, 42-43; Home Bank v. Sears Roebuck Society, 206 Ill. 9; Kough v. Lowry, 263 Ill. 490, 492, and many other cases.

Defendant Kvidera concedes that neither inspection of the records nor of the premises would have disclosed his interest but claims that notice of his interest was conveyed to the officers of the lending bank by certain conversations with them while lounging or playing cards. Even if this were admitted, the conversations are not shown to have been at or near the time the mortgage was made nor in connection with any transaction concerning the property. The title of a purchaser pledging his good on record will not be defeated on the ground that he had notice of a prior unrecorded interest unless the proof of such notice is so clear

and positive as to leave no reasonable doubt that the taking of the conveyance was, under the circumstances, an act of bad faith toward the prior claimant. Robertson v. Wheeler, 162 Ill. 566, 580-81. There were numerous inconsistencies in the testimony of the witnesses of the defendants. Mr. Pflaum testified that he was not positive when the bank knew that Kvidera was interested. Pflaum testified that his partner Cejka owned a quarter interest, but Cejka testified that he had no interest. The master correctly found that the evidence of notice to the lending bank of Kvidera's interest before the loan was made was too unsubstantial and tenuous to carry weight.

There is some basis for the suggestion that Pflaum did not act fairly with Kvidera, and that Rose Kouba, acting under his directions, executed the mortgage in question to raise money to pay his half of the purchase money; that he did this without Kvidera's knowledge for the purpose of securing his own debt. He was the active man in the matter and directed the details of the transaction.

Other points are made by respective counsel which we do not deem it necessary to discuss. It is sufficient to say that the master correctly found that when the mortgage was made the lending bank had no notice of any interest of the defendant Edward Kvidera in the premises conveyed. It was error to decree a lien on one-half interest only of the premises. The decree should have covered the entire real estate conveyed.

For the reason indicated the judgment is reversed and the cause is remanded with directions to enter a decree in accordance with the recommendations of the master.

REVERSED AND REMANDED WITH DIRECTIONS.

Matchett and O'Connor, JJ., concur.

and positive as to leave no reasonable doubt that the maker of the conveyance was, under the circumstances, an act of bad faith toward the prior claimant. Robertson v. Bailey, 1 Ill. App. 380-381. There were numerous immaterial errors in the testimony of the witnesses of the defendants. Mr. Pilgrim testified that he was not positive when the bank knew that Ayldere was interested. Pilgrim testified that his partner Cogins owned a quarter interest, but Cogins testified that he had no interest. The master correctly found that the evidence of notice to the lending bank of Ayldere's interest before the loan was made was too unsubstantial and tenuous to carry weight.

There is some basis for the suggestion that Pilgrim did not act fairly with Ayldere, and that Jone, acting under his directions, executed the mortgage in question to raise money to pay his half of the purchase money; that he did this without Ayldere's knowledge for the purpose of securing his own debt. He was the active man in the matter and directed the details of the transaction.

Other points are made by respective counsel which we do not deem it necessary to discuss. It is sufficient to say that the master correctly found that when the mortgage was made the lending bank had no notice of any interest of the defendant Ayldere in the premises conveyed. It was error to decree a lien on one-half interest only of the premises. The decree should have covered the entire real estate conveyed.

For the reasons indicated the judgment is reversed and the cause is remanded with directions to enter a decree in accordance with the recommendations of the master.

MAY TERM, 1912. D. HOLDEN PRESIDING JUSTICE.

Matchett and O'Connor, JJ., concur.

39828

JOHN F. CORCORAN,
Appellee,

vs.

CITY OF CHICAGO, a Municipal Corporation,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

4 5 A

296 I.A. 645[4]

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiff, with six other young men, was going southward on Western avenue in Chicago in an automobile on the evening of October 12, 1929; as they were crossing 57th street and attempting to pass another automobile in front, the automobile in which they were riding was overturned and caught fire and plaintiff was severely burned; he brought suit, alleging that the accident was caused by the negligence of defendant in suffering the street at this point to have depressions and uneven places, rendering it unsafe and dangerous to persons driving vehicles upon it; upon trial by a jury he had a verdict for $5000; defendant appeals from the judgment for this amount.

Plaintiff at the time of the accident was about 20 years old; he with six others got into an old 1923 model five passenger Studebaker automobile owned and driven by Harold Phillips; they proceeded southward on Western avenue toward intersecting 57th street at a rate of speed which plaintiff and his friends testified was from 25 to 35 miles an hour; there was evidence that the boys had been drinking whiskey and wine; plaintiff was sitting on the front seat between Phillips and George Tyrrell; the other four occupants sat in the rear seat; there was a can of gasoline on the floor in the back which was used to pour into the vacuum tank in the front of the car, as the fuel line was apparently blocked; they approached 57th street driving in the street car tracks; there was

39828

JOHN F. CORCORAN,
Appellee,

vs.

CITY OF CHICAGO, a municipal
Corporation,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

296 I.A. 645

MR. PRESIDING JUSTICE McSURLEY
DELIVERED THE OPINION OF THE COURT.

Plaintiff, with six other young men, was going southward on Western avenue in Chicago in an automobile on the evening of October 12, 1929; as they were crossing 87th street and attempting to pass another automobile in front, the automobile in which they were riding was overturned and caught fire and plaintiff was severely burned; he brought suit, alleging that the accident was caused by the negligence of defendant in allowing the street at this point to have depressions and uneven places, rendering it unsafe and dangerous to persons driving vehicles upon it; upon trial by a jury he had a verdict for $5000; defendant appeals from the judgment for this amount.

Plaintiff at the time of the accident was about 20 years old; he with six others got into an old 1923 model five passenger Studebaker automobile owned and driven by Harold Phillips; they proceeded southward on Western avenue toward intersecting 87th street at a rate of speed which plaintiff and his friends testified was from 25 to 35 miles an hour; there was evidence that the boys had been drinking whiskey and wine; plaintiff was sitting on the front seat between Phillips and George Tyrrell; the other four occupants sat in the rear seat; there was a can of gasoline on the floor in the back which was used to pour into the vacuum tank in the front of the car, as the fuel line was mechanically blocked; they approached 87th street driving in the street car tracks; there was

an automobile in front of them and Phillips turned out to the right to pass it.

Defendant claims that plaintiff failed to prove by a preponderance of the evidence that there was any bump, obstruction or depression in the street which caused the accident, and this is the decisive question in the case.

John Devaney, who was riding in the rear seat of the car, testified that as their car turned out to pass the other it "struck the bump just past the middle of the intersection of 57th and Western - the southwest corner." The car turned over and caught fire and plaintiff was burned. This witness described the obstruction as a "bump in the street." An inquest was held on Arthur Corcoran, one of the party, who came to his death through the accident. Witness Devaney testified that at the inquest he explained the accident thus: "Well, the way the accident happened, to my knowledge, there was a car going south in the carline; Phillips swung out to the right to pass it and he was just about to pass the car when he noticed a car close right passing him - it was very close. He had to cut this other car short - this car going south on the car line. When he cut it short there was so much play in the wheel - well, he just went straight east - I think it was to the southeast and then he tried to swerve or straighten the wheels up. It kept swaying from side to side, that's the way it tipped."

Edward Haas testified that he was riding in the car and that it seemed "like it hit that bump." Another occupant, Gosselin, testified that when their car turned to pass the forward car it hit a hole and Phillips lost control of it. At the inquest he testified that the car in front swung in front of them and that when Phillips saw that he gave a quick turn to the wheel, "intending to pass this fellow up after he saw him swing. He did not have much chance after that, he swung and in order to save from hitting him. I

an automobile in front of them and Phillips turned out to the right to pass it.

Defendant claims that plaintiff failed to prove by a preponderance of the evidence that there was any bump, obstruction or depression in the street which caused the accident, and this is the decisive question in the case.

John Devaney, who was riding in the rear seat of the car, testified that as their car turned out to pass the other it "struck the bump just past the middle of the intersection of 97th and Western - the southwest corner." The car turned over and caught fire and plaintiff was burned. This witness described the obstruction as a "bump in the street." An inquest was held on Arthur Overcoran, one of the party, who came to his death through the accident. Witness Devaney testified that at the inquest he explained the accident thus: "Well, the way the accident happened, to my knowledge, there was a car going south in the curline; Phillips swung out to the right to pass it and he was just about to pass the car when he noticed a car close right behind him - it was very close. He had to cut this other car short - this car going south on the car line. When he cut it short there was so much play in the wheel - well, he just went straight east - I think it was to the northeast and then he tried to swerve or straighten the wheels up. It kept swaying from side to side, that's the way it tipped."

Edward was testified that he was riding in the car and that it seemed "like it hit that bump." Another passenger, Connelly, testified that when their car turned to pass the forward car it hit a hole and Phillips lost control of it. At the inquest he testified that the car in front swung in front of them and that when Phillips saw that he gave a quick turn to the wheel, "intending to pass this fellow up after he saw his swing. He did not have much chance after that he swung and in order to save from hitting him. I

suppose he lost control when he swung and then back again. He turned back again and I guess he lost control of the machine." Plaintiff Corcoran testified that the car got an awful jerk. Joseph Langlois, testifying for plaintiff, said he was in the habit of crossing along that point in the street about five times a week; that there was a depression on the west side of the car track just south of the center line of 57th street about two or three feet from the Western car line "about six inches deep and about a foot wide."

Widmaier had a barbecue stand nearby and testified that there were several holes a little bit west of the street car tracks on the south side of 57th street.

Vincent Cooney testified for plaintiff that there was a bump in the middle of 57th and Western and a nine or ten inch depression about two feet wide running north and south and about a foot east and west. His wife also testified that there was a bump on the west side of Western avenue; and Eleanor Stillwell testified there had been holes there - "right in the middle was a big slope."

It should be noted that plaintiff's witnesses did not agree as to the location of the so-called bump or depression, and the testimony that there was a depression six or nine inches and a foot wide is manifestly an error as shown by the photographs. Mr. and Mrs. Cooney placed the depression or bump "right in the middle of 57th and Western." Widmaier places the holes west of the street car tracks and south of 57th street. Langlois placed the depression on the west side of the car tracks just south of the center line of 57th street. Plaintiff's witnesses who testified at the inquest changed their story at the trial.

Opposed to this defendant introduced photographs of the street at the place of the accident. These were taken three days after the accident, and questioned about them plaintiff's witnesses

supposes he lost control when he swung and then back again. He turned back again and I guess he lost control of the machine."

Plaintiff Corcoran testified that the car got on wrong jets.

Joseph Langlois, testifying for plaintiff, said he was in the habit of crossing along that point in the street about five times a week; that there was a deep hollow on the east side of the car track just south of the center line of 57th street about two or three feet from the Western car line "about six inches deep and about a foot wide."

Widmaier and a barbecue stand nearby and testified that there were several holes a little bit west of the street car tracks on the south side of 57th street.

Vincent Cooney testified for plaintiff that there was a bump in the middle of 57th and Western and a hole or ten inch depression about two feet wide running north and south and about a foot east and west. His wife also testified that there was a bump on the west side of Western avenue; and Hiemer Williwell testified there had been holes there - "right in the middle was a big slope."

It should be noted that plaintiff's witnesses did not agree as to the location of the so-called bump or depression, and the testimony that there was a depression six or nine inches and a foot wide is manifestly an error as shown by the photographs. Mr. and Mrs. Cooney placed the depression or bump "right in the middle of 57th and Western." Widmaier places the holes west of the street car tracks and south of 57th street. Langlois placed the depression on the west side of the car tracks just south of the center line of 57th street. Plaintiff's witnesses who testified at the inquest changed their story at the trial.

Opposed to this defendant introduced photographs of the street at the place of the accident. These were taken three days after the accident, and questioned about them plaintiff's witnesses

said that they show correctly the condition of the street at the time of the accident. Inspection of the photographs which are in the record fails to show any of the bumps, obstructions or depressions in the street pavement to which plaintiff's witnesses testified. The streets at this point are paved with granite bricks, with tar poured into the interstices. The photographs give the impression of a well paved and reasonably smooth surfaced street.

Michael Normoyle, working in the coroner's office at the time of the accident, testified that he examined the place the day after the accident and saw no depression, holes or ridges there.

Morris Ritter, an attorney at law, traveled over this street intersection five or six years twice a day, sometimes riding in an automobile, and for some time prior to the date of the accident he had noted the condition of the pavement there and that it "was good", perhaps a little wavy between the north and south curb lines; there were no holes.

Leo Jader, a salesman living five or six blocks from the place in question, drove his automobile over the intersection about twice a day prior to and for a month or so after the accident; he testified that there were no holes there and that it was a new street at that time. On cross-examination he stated that the street at 57th and Western "was in wonderful condition;" that farther south on Western it was slightly wavy in order to let water run into the sewers, and that at the cross-walk the construction of the street was slightly higher; that there were no holes at any place near the street car track at 57th street.

Daniel Lynch, a police captain, examined the place the day following the accident; he testified that there were no holes there; that there was a slight depression of about an inch, eight or ten inches outside of the west curb of the southbound track; that he went over the place thoroughly.

said that they show correctly the condition of the street at the time of the accident. Inspection of the photographs which are in the record fails to show any of the usual obstructions or depressions in the street pavement to which plaintiff's witnesses testified. The streets at this point are paved with granite blocks, with tar poured into the interstices. The photographs give the impression of a well paved and reasonably smooth surfaced street.

Michael Dormoyle, working in the coroner's office at the time of the accident, testified that he examined the place the day after the accident and saw no depression, holes or ridges there.

Morris Ritter, an attorney at law, traveled over this street intersection five or six times twice a day, sometimes riding in an automobile, and for some time prior to the date of the accident he had noted the condition of the pavement there and that it "was good", perhaps a little wavy between the north and south curb lines; there were no holes.

Leo Jaeger, a salesman living five or six blocks from the place in question, drove his automobile over the intersection about twice a day prior to and for a month or so after the accident; he testified that there were no holes there and that it was a new street at that time. On cross-examination he stated that the street at 27th and Western "was in wonderful condition;" that farther south on Western it was slightly wavy in order to let water run into the sewers, and that at the cross-walk the construction of the street was slightly higher; that there were no holes at any place near the street car track at 27th street.

Daniel Lynch, a police captain, examined the place the day following the accident; he testified that there was no holes there; that there was a slight depression of about an inch, eight or ten inches outside of the west curb of the southbound track; that he went over the place thoroughly.

William Kilbourne, a police officer, traveled that beat on foot, crossing 57th and Western, going both north and south; he testified that there were no holes in any part of the street there; on cross-examination he stated that the street was paved with granite brick, filled in with tar; that there were no holes, just a wave or two - not enough to jar a person in an automobile; that he had driven over that point at 55 and 60 miles an hour without being jarred; that the cross sections where pedestrians cross are a few inches higher but level down to the street about two feet from the curb.

John Ashley, police officer, testified that there were no holes or depressions anywhere in the pavement in question. To the same effect was the testimony of Leo Loesch, who said he knew this location well and there were no holes in the pavement. The witnesses for defendant testified that the photographs represented the true and accurate condition of the pavement at the time and shortly after the accident.

Considering the testimony of all the witnesses, together with inspection of the photographs in the record, leads to the conclusion that the verdict of the jury is manifestly against the weight of the evidence.

A city is not bound under the law to keep its streets absolutely safe. Ordinarily, obstructions or defects in the street to make the city liable must be of such a nature that they are in themselves dangerous, and the duty cast upon the city is that it shall maintain the respective portions of the street in a reasonably safe condition. Boender v. City of Harvey, 251 Ill., 228, 231.

For the reasons indicated the judgment is reversed and the cause is remanded.

REVERSED AND REMANDED.

Matchett and O'Connor, JJ., concur.

William Kilbourne, a police officer, testified that that in foot, crossing 5th and Vineyard, using both north and south; he testified that there were no holes in any part of the street there; on cross-examination he stated that the street was paved with granite block, filled in with tar; that there were no holes, just a wave or two - not enough to jar a person in an automobile; that he had driven over that point at 35 and 40 miles an hour without being jarred; that the cross sections where pedestrians cross are a few inches higher but level down to the street about two feet from the curb.

John Ashley, police officer, testified that there were no holes or depressions anywhere in the pavement in question. In the same effect was the testimony of Leo Joseph, who said he knew this location well and there were no holes in the pavement. The witnesses for defendant testified that the photographs represented the true and exact condition of the pavement at the time and shortly after the accident.

Considering the testimony of all the witnesses, together with inspection of the photographs in the record, leads to the conclusion that the verdict of the jury is manifestly against the weight of the evidence.

A city is not bound under the law to keep its streets absolutely safe. Ordinarily, obstructions or defects in the street to make the city liable must be of such a nature that they are in themselves dangerous, and the duty cast upon the city is that it shall maintain the respective portions of the street in a reasonably safe condition. Koerber v. City of Harvey, 251 Ill., 220, 231.

For the reasons indicated the judgment is reversed and the cause is remanded.

REVERSED AND REMANDED.

Matchett and O'Connor, JJ., concur.

40055

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

AL JOHNSON and MAX JOHNSON,
Plaintiffs in Error.

ERROR TO THE CRIMINAL COURT OF COOK COUNTY.

16A

296 I.A. 646

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Defendants, charged with a conspiracy to defraud the State of Illinois of a large amount of money, upon trial by a jury were found guilty and each was sentenced to imprisonment in the penitentiary and fined $5000. They seek a reversal in this court.

This cause has previously been before us. We then affirmed a judgment against defendants (278 Ill. App. 204). On appeal to the Supreme court it was there held that one of the two counts in the indictment was faulty and the judgment was reversed and the cause remanded for a new trial; upon remandment the faulty count was stricken and the case proceeded to trial on the remaining count; on the prior review no bill of exceptions was presented; the evidence is presented upon this review and defendants make the point that the verdict and judgment are not supported by the evidence.

Defendants are distributors of fuel oil and gasoline, doing business under the name of Consumers Gas & Oil Company, a corporation; they, with Samuel Levin, were charged with a conspiracy to defraud the State of Illinois by making false returns under the Motor Fuel Tax Law of the state and failure to pay the full amount of taxes on gasoline sold by them.

The evidence shows that one McDonnell, a stockholder in the Consumers company, overheard a conversation between Max and Al Johnson, hereafter called defendants, and Levin with respect to the payment to the state of the motor fuel taxes; a certain person,

THE PEOPLE OF THE STATE OF ILLINOIS,
defendant in error,

vs.

AL JOHNSON and ARX DUNCAN,
plaintiffs in error.

Error to the Criminal Court of Cook County.

296 I.A. 646

Criminal offense - Illinois corporation - operating the business of selling oil in violation of the revenue act.

Defendants, doing with a corporation in Illinois the sale of Illinois oil of a large amount of money, upon trial by a jury were found guilty and each was sentenced to imprisonment in the penitentiary and fined $500. They seek a reversal in this court.

This cause has previously been before us. We then affirmed a judgment against defendants (273 Ill. App. 304). On appeal to the Supreme court, it was there held that one of the counts in the indictment was faulty and the judgment was reversed and the cause remanded for a new trial; upon remandment the faulty count was stricken and the case proceeded to trial on the remaining count; on the prior review no mill of exceptions was presented; the evidence is presented upon this review and defendants make the point that the verdict and judgment are not supported by the evidence.

Defendants are distributors of fuel oil and gasoline, doing business under the name of Consumers Gas & Oil Company, a corporation; they, with Ernest Lerin, were charged with a conspiracy to defraud the state of Illinois by making false returns under the motor fuel tax law of the state and failure to pay the full amount of taxes on gasoline sold by them.

The evidence shows that one Hommerd, a stockholder in the Consumers company, overheard a conversation between Ark and Al Johnson, hereafter called defendants, and Levin with respect to the payment to the state of the motor fuel taxes; a certain person,

whose name is not disclosed, advised them at the time that they need pay only a portion of this tax, with suggestions as to how this might be done. A number of witnesses testified as to the subsequent events tending to show the method employed by defendants to defraud the state.

In July and August, 1930, shipments of oil were received by defendants, consigned to the Cicero Paint & Varnish Company, a fictitious concern, which were emptied into defendants' tanks. Other shipments to certain consignees, not identified, were also received by defendants and dumped into tanks of the Consumers company. A number of similar instances were detailed by witnesses. Defendants made reports of these shipments which are false. For example, the report made for August, 1929, showed a total inventory of 74,024 gallons of gasoline received, and at the end of the month 8,749 gallons on hand, showing a sale of 65,275 gallons of gasoline, with the amount of the tax paid at $1919.09. This report was filed September 23, 1929. Subsequently, after defendants were questioned by the state department of finance, defendants on June 9, 1930, amended this report, showing that during August, 1929, they had received over 150,000 gallons and that the total inventory for the month was 155,000 gallons instead of 74,024 gallons before reported. After making certain deductions the second report showed 135,000 gallons subject to tax, on which the taxes amounted to $3983.36 instead of $1919.09 as first reported.

Similar conditions with reference to other reports were shown. The report for September, 1929, signed and sworn to by defendant Al Johnson, showed tax due of $1845.11. The amended report filed July, 1930, for the same month, showed tax due $5800.06. Original reports made, with amended reports, were introduced in evidence showing similar discrepancies, with a total shortage of taxes actually due the state of over $127,000. Defendants did

whose name is not disclosed, actually took at the time that they need pay only a portion of this tax, with suggestions as to how this might be done. A number of witnesses testified to the subsequent events leading to the method adopted by defendants to defraud the state.

In July and August, 1[illegible], quantities of oil were received by defendants, consigned to the Ojeda Paint & Varnish Company, a fictitious concern, which was established in defendants' name. Other shipments to certain industries, not identified, were also received by defendants and caused 20% taxes of the consumers company. A number of similar instances were detailed by witnesses. Defendants made reports of these shipments which are false. For example, the report made for August, 1[illegible], showed a total inventory of 74,000 gallons of gasoline received, and at the end of the month 8,740 gallons on hand, showing a sale of 65,270 gallons of gasoline, with the amount of the tax paid of $1313.00. This report was filed September 20, 1[illegible]. Subsequently, after defendants were questioned by the state department of finance, depositions on June 5, 1[illegible], amended this report, showing that during August, 1[illegible], they had received over 150,000 gallons and that the total inventory for the month was 1[illegible] gallons instead of 74,000 gallons which had received. After making certain deductions the amount taxed remains 150,000 gallons subject to tax, on which the taxes amounted to $[illegible].36 instead of $1313.00 as first reported.

Similar transactions with a [illegible] other refiners were shown. The report for October, 1[illegible], showed and sworn to by defendant Al Jamison, showed tax due of $[illegible]. The amended report filed July, 1[illegible], for the same month, showed tax due $[illegible].00. Original reports made, with amended reports, were introduced in evidence showing these discrepancies, with a total shortage of taxes actually due the state of over $[illegible],000. Defendants did

not testify upon the trial and did not deny that they made false reports as to the amount of their sales of gasoline. It would unduly lengthen this opinion to detail in full the many instances where defendants, by the use of fictitious names, sought to cover their receipts and sales of gasoline.

Some argument is presented touching permitted exemptions of gasoline shipped under the Interstate Commerce act, citing Prairie Oil and Gas Co. v. Ehrhardt, 244 Ill. 634. The facts in that case show unmistakeably that it came into the state under the Interstate Commerce act. However, the reports made in the present case show that defendants themselves eliminated whatever gasoline they claimed should be treated as interstate commerce.

Defendants' brief discusses the question of the indictment, but this matter has already been settled by the decision of the Supreme court.

We do not think it necessary to discuss the exact amount of gasoline on which defendants did not pay the fuel tax. Roughly speaking, the record shows one million gallons of gasoline, bought and sold under names of fictitious persons, which defendants themselves took into their own tanks and sold to their own customers, upon which no fuel taxes were paid.

Defendants say that the court unduly restricted the cross-examination of witness Wemple, employed with the Motor Fuel Tax Division of the State Department of Finance, in that the witness was not permitted to answer questions concerning a shortage in the accounts of the witness's predecessor in office, a Mr. Kinney. The court ruled properly in this respect. There was no showing that the alleged shortage of Kinney had any connection with the accounts of defendants' company. Moreover, there was no specific objection but only a general objection to the witness's testimony, and the books to which the witness was testifying were the books of the

not testify upon the trial and did not deny that they made false reports as to the amount of their sales of gasoline. It would unduly lengthen this opinion to detail in full the many instances where defendants, by the use of fictitious names, undertook to cover their receipts and sales of gasoline.

Some argument is presented tending permitted examiners of gasoline shipped under the interstate commerce act, citing Pratts Oil and Gas C. v. Commonwealth, 144 Ill. 604. The facts in that case show unmistakeably that it came into the state under the interstate Commerce act. However, the records made in the present case show that defendants themselves claimed whatever gasoline they claimed should be treated as interstate commerce.

Defendants' brief discusses the question of the indictment, but this matter has already been settled by the decision of the supreme court.

We do not think it necessary to discuss the exact amount of gasoline on which defendants did not pay the tax. Roughly speaking, the records show one million gallons of gasoline, bought and sold under names of fictitious persons, which defendants themselves took from their own tanks and sold to their own customers, upon which no tax had taken place.

Defendants say that the court unduly restricted the cross-examination of witness Mundy, employed with the Motor Fuel Tax Division of the State Department of Finance, in that the witness was not permitted to answer questions concerning a shortage in the accounts of the witness's predecessor in office, a Mr. Mundy. The court ruled properly in this respect. There was no showing that the alleged shortage of Mundy had any connection with the accounts of defendants' company. Moreover, there was no specific objection but only a general objection to the witness's testimony, and the books to which the witness was testifying were the books of the

Department of Finance containing the reports made by defendants themselves, which they did not deny. Other points are made which have already been decided by the Supreme court. The decisive question now presented is one of fact and the evidence convinces beyond all reasonable doubt that the defendants were guilty of the crime charged.

Some criticism is made as to the forms of the verdict and judgment, but in what respects we are not told. The criticism against the judgment seems to be based upon the assumption that it is a joint judgment and that under the indeterminate sentence one defendant might be released from imprisonment before the other. This assumption is wrong. The judgment is not joint but is individual as to each.

As we have said, the evidence shows beyond any reasonable doubt that pursuant to a conspiracy defendants withheld payment of fuel taxes to the state of more than $127,000. We see no valid reason to disagree and the judgment is affirmed.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

Department of Finance containing the reports made by defendants themselves, which they did not deny. Other points are made which have already been decided by the District Court. The technical question now presented is one of fact and the evidence convinces beyond all reasonable doubt that the defendants were guilty of the crime charged.

Some criticism is made as to the form of the verdict and judgment, but in what respects we are not told. The criticism against the judgment seems to be based upon the assumption that it is a joint judgment and that under the indeterminate sentence one defendant might be released from imprisonment before the other. This assumption is wrong. The judgment is not joint but is individual as to each.

As we have said, the evidence shows beyond any reasonable doubt that payment to a conspiracy defendants withheld payment of fuel taxes to the state of more than $17,000. We see no valid reason to disagree and the judgment is affirmed.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

40328

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

ELMER SPENCER,
Plaintiff in Error.

ERROR TO THE COUNTY COURT OF COOK COUNTY.

296 I.A. 646

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Defendant on trial by a jury, was found guilty of violation of the Medical Practice Act in that without a license he diagnosed and treated the supposed ailment of one Charlotte Hermes for an infection of the kidneys and sinuses; he was sentenced upon the verdict, to be committed to the county jail of Cook county for 30 days.

He appealed from the judgment to the Supreme court, but that court held that the case was wrongfully appealed to that court and transferred it to this court.

Defendant says that the trial court should have quashed the information as it fails to state a crime. In The People v. Brown, 336 Ill. 257, cited in support, the information merely used the general language of the statute and charged Brown with unlawfully "treating human ailments ** without a valid existing license so to do." It was held that this was not sufficient to inform defendant of the acts said to be unlawful. In the instant case the counts charge with particularity and describe in detail the conduct of defendant in treating the supposed ailments of the complaining witness. The first count charged that defendant diagnosed the ailments as a kidney infection and sinus infection; the second and third counts describe in detail his treatment; the fourth count charged that he unlawfully caused his name to be printed upon the door to the stairway leading to his office, describing himself as a chiropractor, and to the same effect his name was published in the

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

ELMER SPECHER,
Plaintiff in Error.

Error to the Criminal Court
of Cook County.

296 I.A. 646

MR. PRESIDING JUSTICE MCSURELY
DELIVERED THE OPINION OF THE COURT.

Defendant on trial by a jury, was found guilty of violation of the medical practice act in that without a license he diagnosed and treated the supposed ailment of one Charlotte Nurses for an infection of the kidneys and sinuses; he was sentenced upon the verdict, to be committed to the county jail of Cook county for 30 days.

He appealed from the judgment to the supreme court, but that court held that the case was wrongfully appealed to that court and transferred it to this court.

Defendant says that the trial court should have quashed the information as it fails to state a crime. In the People v. Brown, 336 Ill. 257, cited in support, the information merely used the general language of the statute and charged Brown with unlawfully "treating human ailments -- without a valid existing license so to do." It was held that this was not sufficient to inform defendant of the acts said to be unlawful. In the instant case the counts charge with particularity and describe in detail the conduct of defendant in treating the supposed ailments of the complaining witness. The first count charged that defendant diagnosed the ailments as a kidney infection and sinus infection; the second and third counts describe in detail his treatment; the fourth count charged that he unlawfully caused his name to be printed upon the door to the stairway leading to his office, describing himself as a chiropracter, and to the same effect his name was published in the

suburban telephone directory; that he also maintained and equipped offices in the building at 13008 Western avenue, including an electric apparatus and devices - one called a "neurocalometer" - to be used in the examination and treatment of persons supposed to be afflicted with any ailment. The information in every count is laid under a videlicet and clearly and specifically informs defendant of the acts with which he is charged.

It was not necessary to allege and prove that the acts committed were not in cases of emergency, in compliance with section 21 of the Medical Practice Act, chap. 91, par. 16f, Ill. Rev. Stats. 1937. The information was filed under section 24 and emergency cases are not excepted. The exception of emergency cases is usually a matter of defense. The People v. Shaver, 289 Ill. App. 612 (abst.); The People v. Prystalski, 358 Ill. 198-203-04. The motion to quash was properly denied. The People v. Green, 362 Ill., 171, 173-4; The People v. Westerdahl, 316 Ill., 86; The People v. Allen, 360 Ill., 36, 41-42.

There was no variance between the proof and the allegations in the information. Moreover, this point was not raised upon the trial at any time. It is too late to make the point for the first time in this court. The People v. Garamony, 359 Ill., 210; The People v. Shaw, 300 Ill., 451, 454.

The complaining witness, Charlotte Hermes, testified that she was an investigator for the Department of Registration and Education; that pursuant to instructions on January 16, 1937, she went to the office of the defendant at 13008 south Western avenue, Blue Island, Illinois; she saw a sign, "Spencer & Spencer, Chiropractors" at the bottom of a stairway, and on the second floor saw signs on the door indicating an office, with the words "Walk in." Defendant told the witness that he was Dr. Spencer; she told him she suffered from headaches and pains in the back of her neck and

suburban telephone directory; that it also maintained and equipped offices in the building at 1000 Western avenue, including an electric apparatus and device - one called a "neurocalometer" - to be used in the examination and treatment of persons supposed to be afflicted with any ailment. The information in every count is laid under a vindicect and clearly and specifically informs defendant of the acts with which he is charged.

It was not necessary to allege and prove that the acts committed were not in cases of emergency, in compliance with section 21 of the Medical Practice Act, Comp. Stat. 1927, Ch. 91, par. 1dt, Ill. Rev. Stats. 1937. The information was filed under section 24 and emergency cases are not excepted. The exception of emergency cases is usually a matter of defense. The People v. Weaver, 290 Ill. App. 612 (abst.); The People v. Trybulski, 355 Ill. 198-203-04. The motion to quash was properly denied. The People v. Green, 302 Ill., 171, 173-4; The People v. Trybulski, 310 Ill., 86; The People v. Allen, 360 Ill., 36, 41-42.

There was no variance between the proof and the allegations in the information. Moreover, this point was not raised upon the trial at any time. It is too late to make the point for the first time in this court. The People v. Gurnsey, 358 Ill., 310; The People v. Shaw, 300 Ill., 111, 124.

The complaining witness, Charlotte Jarvis, testified that she was an investigator for the Department of Registration and Education; that pursuant to instructions on January 10, 1937, she went to the office of the defendant at 1000 South Western avenue, Blue Island, Illinois; she saw a sign, "Spencer & Spencer, Chiropractors" at the bottom of a stairway, and on the second floor saw signs on the door indicating an office, with the words "Walk in." Defendant told the witness that he was Dr. Spencer; she told him she suffered from headaches and pains in the back of her neck and

asked whether he thought his treatments could help her; she partially disrobed, as instructed by him, and put on a white apron and sat on a stool before an electrical apparatus with a small metal belt around her waist which was attached to the electrical apparatus, and another attachment was held to her forehead. Defendant turned some of the dials on the apparatus and told Mrs. Hermes he could tell from vibrations where the trouble was; that she had a slight infection of the kidneys and also that the sinuses were not clear. He then used another instrument which he called a "Neurocalometer"; he told her this instrument would produce heat on a pinched nerve, that her top vertebra was not perfectly straight, and he adjusted a place right between the shoulder blades with a sudden pressure so that the bones snapped; he also applied a metal plate fitting over the nose and a small plate between the shoulder blades and also a metal plate on the stomach. The witness was of the impression that these were attached to a cord connected with the wall. On inquiring she was told by defendant that his charge for this treatment was $1.50, which she paid to him and he gave her a receipt for it. No defense was made except the introduction of some witnesses testifying to defendant's good reputation.

On cross-examination Mrs. Hermes testified that there was nothing the matter with her at the time she called upon defendant; that she gave him a wrong name and address and that she went to defendant's office under instructions from someone in the department of registration. Defendant argues that this clearly shows an entrapment of defendant, citing The People v. Beach, 266 Ill. App. 272. There the judgment against defendant was reversed on the ground that among other things the investigator, by false pretenses, persuaded the defendant to do what he did; an examination of the opinion shows that the defendant did not treat by manipulation or by rubbing of any kind; that he treated "by spiritual means" only. There was

asked whether he thought his treatments could help her; she partially disrobed, as instructed by him, and put on a white apron and sat on a stool before an electrical apparatus with a small metal belt around her waist which was attached to the electrical apparatus, and another attachment was held to her forehead. Defendant turned some of the dials on the apparatus and told she, because he could tell from vibrations where the trouble was; that she had a slight infection of the kidneys and also that the eyesses were not clear. He then used another instrument which he called a "vacuum calometer"; he told her this instrument would produce heat on a pinched nerve, that her top vertebra was not perfectly straight, and he adjusted a piece right between the shoulder blades with a sudden pressure so that the bones snapped; he also applied a metal plate fitting over the nose and a small plate between the shoulder blades and also a metal plate on the stomach. The witness was of the impression that these were attached to a cord connected with the wall. On inquiring she was told by defendant that his charge for this treatment was $1.50, which she paid to him and he gave her a receipt for it. No defense was made except the introduction of some witnesses testifying to defendant's good reputation.

On cross-examination Mrs. Berge testified that there was nothing the matter with her at the time she called upon defendant; that she gave him a wrong name and address and that she went to defendant's office under instructions from someone in the department of registration. Defendant argues that this clearly shows an entrapment of defendant, citing The People v. Beach, 256 Ill. App. 272. There the judgment against defendant was reversed on the ground that among other things the investigator, by false pretences, persuaded the defendant to do what he did; an examination of the opinion shows that the defendant did not treat by manipulation or by rubbing of any kind; that he treated "by spiritual means" only. There was

abundant evidence that he used no physical means in his treatment. These facts distinguish the Beach case from the one before us.

Moreover, in The People v. Ficke, 343 Ill. 367, 377, it was held that it was not entrapment or solicitation to crime for one having reason to believe that another is committing or intending to commit a criminal offense to furnish an opportunity for the commission of this offense, and if the purpose is in good faith, to secure evidence against a person guilty of a criminal offense and not to induce an innocent person to commit a crime, there is no merit in the claim that the person was entrapped.

Applying this to defendant's case, we are clearly of the opinion that he was not entrapped but treated the complaining witness as he customarily treated persons calling upon him for treatment of their ailments.

The evidence showed defendant guilty beyond all reasonable doubt, and the judgment entered on the verdict is affirmed.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

abundant evidence that he used no physical means on his statement.

These facts distinguish the based case from the one before us.

Moreover, in the People v. Allen, 315 Ill. 327, 329, it was held that it was not entrapment or solicitation to crime for one having reason to believe that another is considering or intending to commit a criminal offense to furnish an opportunity for the commission of such offense, and if the purpose is in good faith, to secure evidence against a person guilty of a criminal offense and not to induce an innocent person to commit a crime, there is no merit in the claim that the person was entrapped.

Applying this to defendant's case, we are clearly of the opinion that he was not entrapped but treated the complaining witness as he customarily treated persons calling upon him for treatment of their ailments.

The evidence proved defendant guilty beyond all reasonable doubt, and the judgment entered on the verdict is affirmed.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

39500

DAVID H. LENTZ and ROBERT J. JOUTRAS,
Appellees,

vs.

MILLER RUBBER PRODUCTS COMPANY,
Appellant.

WOODLAWN SERVICE COMPANY,
(Intervenor) Appellant.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

296 I.A. 646

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In an action for commissions under the terms of a written contract, upon trial by jury there was a verdict for plaintiff of $3990, a remittitur by plaintiffs of $233 and judgment against Miller Rubber Products Company for $3757, to reverse which this appeal has been perfected.

The controversy was before this court on a former appeal (Lentz et al. v. Miller Rubber Products Co., 282 Ill. App. 622) where a summary judgment for plaintiffs on the pleadings for $1285.20 was reversed and the cause remanded for the reason that defendant's amended answer set up a meritorious defense to the effect that the contract on which the suit was based had been obtained by plaintiffs through fraudulent representations. Upon the second trial the cause was submitted to the jury on this issue.

April 28, 1934, plaintiffs entered into a written contract with the Woodlawn Service Company, whereby the Service company agreed to purchase all its requirements of rain capes to be sold within the grounds of the 1934 Century of Progress Exposition at the sum of $5.40 a dozen. The contract also provided: "It is further agreed that the parties of the first part use their influence to insure the party of the second part a retail minimum

39500

DAVID H. LEWTZ and GILBERT T. JOUTRAS,
Appellees,

vs.

MILLER RUBBER PRODUCTS COMPANY,
Appellant.

WOODLAWN SERVICE COMPANY,
(Intervenor) Appellant.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

29601.A. 646

MR. JUSTICE WALDEMAR DELIVERED THE OPINION OF THE COURT.

In an action for commissions under the terms of a written contract, upon trial by jury there was a verdict for plaintiff of $3990, a restitution by plaintiff of $232 and judgment against Miller Rubber Products Company for $3757, to reverse which this appeal has been perfected.

The controversy was before this court on a former appeal (Lewtz et al. v. Miller Rubber Products Co., 282 Ill. App. 632) where a summary judgment for plaintiffs on the pleadings for $1282.20 was reversed and the cause remanded for the reason that defendant's amended answer set up a meritorious defense to the effect that the contract on which the suit was based had been obtained by plaintiffs through fraudulent representations. Upon the second trial the cause was submitted to the jury on this issue.

April 26, 1934, plaintiffs entered into a written contract with the Woodlawn Service Company, whereby the service company agreed to purchase all its requirements of rain coats to be sold within the grounds of the 1934 Century of Progress exposition at the sum of $5.40 a dozen. The contract also provided: "It is further agreed that the parties of the first part use their influence to insure the party of the second part a total minimum

price of $1.00 a cape will be maintained within and on the premises of the 1934 A Century of Progress Exposition." There was a further provision that if plaintiffs failed to control the sale and price level the Woodlawn Service Company would be relieved of any liability and the contract would be null and void, it being understood by both parties that "should capes be smuggled in and sold contrary to the terms of this contract that the parties of the first part be given a fair opportunity by the party of the second part to correct the evil above mentioned."

As of the same date, but afterward, the plaintiffs, the defendant and the Woodlawn Service Company entered into the tripartite contract which is the basis of this suit. This tripartite agreement provides that "Woodlawn will purchase from Miller and Miller will sell to Woodlawn, Woodlawn's entire requirements of rubber rain capes for sale at the 1934 A Century of Progress Exposition. Woodlawn and also Lentz and Joutras have represented to Miller that no other rain capes, either of rubber or other material, will be handled or sold at the Exposition during 1934. Based upon such representation and in order to meet the anticipated requirements of Woodlawn, Miller will be required to make certain commitments and expenditures. In consideration therefor Woodlawn and Lentz and Joutras agree that during 1934 they will not directly or indirectly handle or sell in or about the Exposition or in the City of Chicago any other rain capes than those to be furnished hereunder by Miller, except in the event Woodlawn's demands exceed Miller's capacity to supply, in which event Woodlawn shall have the right during such period as Miller is unable to supply Woodlawn's entire requirements of rubber rain capes, to purchase elsewhere such portion of its requirements as Miller is unable to supply." The contract also provides that Miller will pay to Lentz and Joutras a

price of $1.00 a cape will be maintained within and on the premises of the 1934 A Century of Progress Exposition." There was a further provision that if plaintiffs failed to control the sale and price level the Woodlawn Service Company would be relieved of any liability and the contract would be null and void, it being understood by both parties that "should capes be smuggled in and sold contrary to the terms of this contract that the parties of the first part be given a fair opportunity by the party of the second part to correct the evil above mentioned."

As of the same date, but antedated, the plaintiffs, the defendant and the Woodlawn Service Company entered into the tripartite contract which is the basis of this suit. This tripartite agreement provides that "Woodlawn will purchase from Miller and Miller will sell to Woodlawn, Woodlawn's entire requirements of rubber rain capes for sale at the 1934 A Century of Progress Exposition. Woodlawn and also Lentz and Jontzes have represented to Miller that no other rain capes, either of rubber or other material, will be handled or sold at the Exposition during 1934. Based upon such representation and in order to meet the anticipated requirements of Woodlawn, Miller will be required to make certain commitments and expenditures. In consideration therefor Woodlawn and Lentz and Jontzes agree that during 1934 they will not directly or indirectly handle or sell in or about the Exposition or in the City of Chicago any other rain capes than those to be furnished hereunder by Miller, except in the event Woodlawn's demands exceed Miller's capacity to supply, in which event Woodlawn shall have the right during such period as Miller is unable to supply Woodlawn's entire requirements of rubber rain capes, to purchase elsewhere such portion of its requirements as Miller is unable to supply." The contract also provides that Miller will pay to Lentz and Jontzes a

commission of 60¢ per dozen capes in full for their services or expenditures and obligations incurred. The plaintiffs' claim in this case is for commissions earned under this contract.

The issues of fact presented as to whether the contract was obtained by fraudulent representations have been settled by the verdict of the jury against defendant's contentions. The defendant contends that the verdict is clearly and manifestly against the weight of the evidence. The false representations averred to have been made were that plaintiffs had represented that they had the exclusive right to sell rubber rain capes within the Exposition grounds; that no rain capes of any kind other than those manufactured by the defendant could or would be sold by any person within those grounds. This was an affirmative defense and the burden of proof was upon the defendant to establish it. Postlewait v. Higby, 83 Ill. App. 414; Woodrow v. Quaid, 292 Ill. 27. An examination of the evidence discloses that it does not sustain defendant's contention. As a matter of fact, it appears without contradiction that on January 4, 1934, and prior to the negotiations between the parties to this agreement, the Woodlawn Service Company had obtained a concession from the Century of Progress Exposition giving to it the right to sell rubber rain capes. This fact was known to all the parties and there could have been no ground for them to believe that plaintiffs had or could get the exclusive right to sell rain capes on the Exposition grounds. Becker, manager of the Woodlawn Service Company, testified that he knew such exclusive right could not be obtained by anyone and admitted plaintiffs never told him thay had any such exclusive right. Plaintiffs both denied that any such representations were made, and not withstanding some evidence to the contrary this court cannot hold that the verdict is against the weight of the evidence.

Defendant, however, shifts from the issue of fact to an

commission of 60¢ per dozen crates in full for their services or expenditures and obligations incurred. The plaintiffs' claim in this case is for commissions earned under this contract.

The issues of fact presented as to whether the contract was obtained by fraudulent representations have been settled by the verdict of the jury against defendant's contentions. The defendant contends that the verdict is clearly and manifestly against the weight of the evidence. The false representations averred to have been made were that plaintiffs had represented that they had the exclusive right to sell rubber rain capes within the Exposition grounds; that no rain capes of any kind other than those manufactured by the defendant could or would be sold by any person within those grounds. This was an affirmative defense and the burden of proof was upon the defendant to establish it. Postlewait v. Hipp, 65 Ind. App. 624; Woodrow v. Wood, 54 Ind. 27. An examination of the evidence discloses that it does not sustain defendant's contention. As a matter of fact, it appears without contradiction that on January 4, 1934, and prior to the negotiations between the parties to this agreement, the Woodlawn Service Company had obtained a concession from the Century of Progress Exposition giving to it the right to sell rubber rain capes. This fact was known to all the parties and there could have been no ground for them to believe that plaintiffs had or could get the exclusive right to sell rain capes on the Exposition grounds. Becker, manager of the Woodlawn Service Company, testified that he knew such exclusive right could not be obtained by anyone and admitted plaintiffs never told him they had any such exclusive right. Plaintiffs both denied that any such representations were made, and not withstanding some evidence to the contrary this court cannot hold that the verdict is against the weight of the evidence.

Defendant, moreover, waives the issue of fact to in

issue of law. It urges that the two contracts having been executed as of the same date should have been construed together, (citing Carstens Pack. Co. v. Sterne, 286 Ill. 355, and similar cases) and that the court should have interpreted these contracts as requiring plaintiffs to control the sale of capes at the Exposition and maintain a minimum retail price therefor as a condition precedent to recovery. Defendant says plaintiffs offered no proof of the performance on their part of any such condition precedent and argues that in the absence of such proof an instruction asked in its favor at the close of all the evidence should have been given. No such defense as this was set up in defendant's answer. The evidence shows that defendant gave notice of the renunciation of its contract with plaintiffs by a letter dated August 24, 1934. It made no such claim in this letter. On the contrary the sole reason for renunciation as stated therein is, "that Woodlawn Service Company has refused to buy merchandise from us under your contract." It is the law of this State that when a party to a contract refuses to perform, giving special reasons therefor, reasons for non-performance other than those stated are waived. Lohr Bottling Co. v. Ferguson, 223 Ill. 88; Selman v. Geary, 334 Ill. 642; Kuska v. Vankat, 341 Ill. 358. Nor in our opinion can these two contracts be construed together. While it is true they were executed about the same time, they were not between the same parties nor was the subject matter thereof (while somewhat similar) identical. Indeed, the provisions of the tri-partite contract were in some respects inconsistent with those of the bilateral contract. However, even if these contracts are construed together, we find no provision therein which would amount to a representation upon the part of these plaintiffs that they had an exclusive right to sell rain capes on the Exposition ground. The statement in the tri-partite contract to the effect that Lentz and Joutras have represented to Miller that no

large of law. It argues that the contracts having been executed as of the same date should have been construed together, (citing Carstens Pack. Co. v. Stamos, 280 Ill. 386, and similar cases) and that the court should have interpreted these contracts as requiring plaintiffs to perform the duties at the Exposition and maintain a minimum retail price herein as a condition precedent to recovery. Defendant says plaintiffs offered no proof of the performance on their part of any such condition precedent and argues that in the absence of such proof an instruction asked in its favor at the close of all the evidence should have been given. No such defense as this was set up in defendant's answer. The evidence shows that defendant gave notice of the termination of its contract with plaintiffs by a letter dated August 14, 1934. It made no such claim in this letter. On the contrary the sole reason for termination as stated therein is, "that Goodyear Service Company has refused to fully carry out its duties under your contract." It is the law of this State that when a party to a contract relies to perform, giving special reasons therefor, reasons for nonperformance other than those stated are waived. Lore Clothing Co. v. Ferguson, 223 Ill. 44; Kenney v. Cherry, 334 Ill. 642; Lynch v. Vunkat, 341 Ill. 386. Nor in our opinion can these two contracts be construed together. While it is true they were executed about the same time, they were not between the same parties nor was the subject matter thereof (while somewhat similar) identical. Indeed, the provisions of the tri-partite contract were in some respects inconsistent with those of the bilateral contract. However, even if these contracts are construed together, we find no provision therein which would amount to a representation upon the part of these plaintiffs that they had an exclusive right to sell rain capes on the Exposition grounds. The statement in the tri-partite contract to the effect that Lewis and Lowitz have represented to Miller that no

other rain capes (either of rubber or other material) will be handled or sold at the Exposition during 1934, when construed in connection with other provisions of the contract must be held to mean that no other rain capes would be handled by them at the Exposition during that year. There is no evidence tending to show that this provision of the agreement was not kept by them. In the next place, defendant contends that the instruction should have been given because its answer specifically denied that the defendant was liable to plaintiffs jointly, and there was no reply or denial of this fact as stated in the answer. Defendant cites Sections 32 and 40 of the Civil Practice Act and 28 Illinois Law Review 460, to the effect that allegations of an answer not denied must be assumed to be true. We are not impressed by this contention. No rule to reply to the answer was requested. By going to trial without objection a reply was waived. The defense urged in substance amounted to a plea of misjoinder which forms the subject matter of sections 23 and 26 of the Civil Practice Act. Section 26 (see Ill. Practice Act Annotated, McCaskill, p. 53) expressly provides:

> "No action shall be defeated by nonjoinder or misjoinder of parties. New parties may be added and parties misjoined may be dropped by order of the court, at any stage of the cause, before or after judgment, as the ends of justice may require."

Defendant points out that plaintiffs must recover, if at all, on the case stated in their complaint, and cites Fornoff v. Smith, 281 Ill. App. 232. This is quite true, but the question of any variance between the case stated in the complaint and that proved was not raised by any motion of defendant in the trial court.

The further contention is made that plaintiffs were not entitled to recover commissions which accrued after August 2, 1934. On that date defendant gave notice of its intention to discard the contract. At that time only $1285.20 was due, and defendant says recovery for any larger amount would not have been permitted. The

other rain cases (either of tracer or other material) will be decided or sold at the exposition during 1934, when considered in connection with other violations of the contract must be held to mean that no other rain cases would be handled by them at the exposition during that year. There is no evidence tending to show that this provision of the agreement was not kept by them. In the next place, defendant contends that the instruction should have been given because its answer specifically denied that the defendant was liable to plaintiffs jointly, and there was no reply or denial of this fact as stated in the answer. Defendant cites sections 32 and 40 of the Civil Practice Act and 73 Illinois Law Review 400, to the effect that allegations of an answer not denied must be assumed to be true. We are not impressed by this contention. No call to reply to the answer was requested. By going to trial without objection a reply was waived. The defense urged in substance amounted to a plea of misjoinder which forms the subject matter of sections 23 and 26 of the Civil Practice Act. Section 46 (see Ill. Practice Act Annotated, McCormick, p. 52) expressly provides:

> "No action shall be defeated by nonjoinder or misjoinder of parties. New parties may be added and parties misjoined may be dropped by order of the court, at any stage of the cause, before or after judgment, as the ends of justice may require."

Defendant points out that plaintiffs must recover, if at all, on the case stated in their complaint, and cites Kennott v. Smith, 251 Ill. App. 232. This is quite true, but the question of any variance between the case stated in the complaint and that proved was not raised by any motion of defendant in the trial court.

The further contention is made that plaintiffs were not entitled to recover commissions which accrued after August 6, 1934. On that date defendant gave notice of its intention to discard the contract. At that time only $1,221.50 was due, and defendant says recovery for any larger amount could not have been permitted. The

tri-partite contract contains this provision: "It is agreed that upon receipt by Miller of written notice from Woodlawn that a certain agreement dated April 28, 1934, between Lentz and Joutras and Woodlawn has been cancelled or terminated or is no longer in effect, Miller will within fifteen (15) days make payment to Lentz and Joutras of the net amount of commissions accrued and payable to the date of receipt of such notice, and that all commissions which may accrue subsequent to the date of receipt of such notice will be held by Miller subject to such disposition as Lentz and Joutras and Woodlawn may mutually agree upon. Such withholding of payment of commissions by Miller shall not in any manner affect the rights and liabilities of the parties hereto in respect to any other terms and provisions of this agreement." The sum and substance of this provision was that defendant would pa y accrued commissions to plaintiffs within 15 days after notice of cancellation of the contract between the plaintiffs and the Woodlawn Service Company, and that other commissions would be held subject to such disposition as plaintiffs and Woodlawn might mutually agree upon. Defendant, however, did not pay commissions then due within 15 days. It did not await instructions from the Woodlawn Service Company and plaintiffs as to the payment of other commissions. On the contrary it notified plaintiffs that because the Service company refused to purchase capes from it under their contract, defendant was terminating its liability under the contract sued upon. As a matter of fact, the Woodlawn Service Company did not terminate its contract with defendant but continued to purchase its entire requirements from it.

The Service company has intervened and filed a counterclaim adopting defendant's theory of false representations and claiming it is entitled to the commissions. This evident collusion between these two parties cannot prevail. No defense of this kind was set up in the answer. We hold it was waived.

The judgment is affirmed. AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

tri-partite contract contains this provision: "It is agreed that upon receipt by Miller of written notice from Woodlawn that a certain agreement dated April 16, 1934, between Santa and Joutras and Woodlawn has been cancelled or terminated or is no longer in effect, Miller will within fifteen (15) days make payment to Santa and Joutras of the net amount of commissions accrued and payable to the date of receipt of such notice, and that all commissions which may accrue subsequent to the date of receipt of such notice will be held by Miller subject to such disposition as Santa and Joutras and Woodlawn may mutually agree upon. Such withholding of payment of commissions by Miller shall not in any manner affect the rights and liabilities of the parties hereto in respect to any other terms and provisions of this agreement." The sum and substance of this provision was that defendant would pay accrued commissions to plaintiffs within 15 days after notice of cancellation of the contract between the plaintiffs and the Woodlawn Service Company, and that other commissions would be held subject to such disposition as plaintiffs and Woodlawn might mutually agree upon. Defendant, however, did not pay commissions then due within 15 days. It did not await instructions from the Woodlawn Service Company and plaintiffs as to the payment of other commissions. On the contrary it notified plaintiffs that because the Service company refused to purchase oxygen from it under their contract, defendant was terminating its liability under the contract and upon. As a matter of fact, the Woodlawn Service Company did not terminate its contract with defendant but continued to purchase its entire requirements from it.

The Service company has intervened and filed a counterclaim adopting defendant's theory of their respective rights and claiming it is entitled to the commissions. This without collusion between these two parties cannot prevail. In defense of this kind was set up in the answer. We hold it was waived.

The judgment is affirmed.

AFFIRMED.

Mounsey, P. J., and O'Connor, J., concur.

39935

In the Matter of the Estate of
CHESTER CORBIN, Deceased,

AUGUSTINE CORBIN,
Appellee,

vs.

DAVID H. KRAFT, as Administrator of
the Estate of Chester Corbin, Deceased,
Appellant.

APPEAL FROM CIRCUIT
COURT OF COOK COUNTY.

49A

296 I.A. 646

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This appeal brings before us an order of the Circuit court entered November 1, 1937, in lieu of a prior order entered October 8. By this order the Circuit court disposed of certain appeals of Augustine Corbin, widow of deceased, from orders of the Probate court overruling her objections to the final account of the administrator as recasted, and denying the prayer of her petition for the removal of the administrator. On her own motion the appeal from the order denying removal was dismissed. Her objections to three items of the final account as recasted were sustained. First, the Probate court allowed to the administrator the amount paid to Hayes, a commissioner appointed to take evidence and report upon the proof of heirship, to the amount of $350. The Circuit court reduced this amount to $167.30. Second, the Probate court allowed the amount paid to a stenographer for services rendered upon the reference in the amount of $118.45. The Circuit court reduced this allowance to $50. Third, the Probate court allowed to the administrator and his attorney for their services the sum of $963.27, 10% of the estate. The Circuit court adjudged that neither the administrator nor his attorney was entitled to any fees and disallowed this item.

The record discloses two notices by the administrator of

39935

In the Matter of the Estate of
CHARLES COBURN, Deceased.

AUGUSTINE COBURN,
Appellee,

vs.

DAVID K. EGAN, as Administrator of
the Estate of Charles Coburn, Deceased,
Appellant.

APPEAL FROM CIRCUIT
Order of Cook County.

296 I.A. 646

MR. JUSTICE ALSCHULER DELIVERED THE OPINION OF THE COURT.

This appeal brings before us an order of the circuit court entered November 1, 1917, in lieu of a prior order entered October 8. By this order the circuit court disposed of certain appeals of Augustine Coburn, widow of deceased, from orders of the probate court overruling her objections to the final account of the administrator as restated, and denying the prayer of her petition for the removal of the administrator. On her own motion the appeal from the order denying removal was dismissed. Her objections to three items of the final account as restated were sustained. First, the probate court allowed to the administrator the amount paid to Boyer, a commissioner appointed to take evidence and report upon the proof of heirship, to the amount of $250. The circuit court reduced this amount to $167.50. Second, the probate court allowed the amount paid to a stenographer for services rendered upon the reference in the amount of $113.40. The circuit court reduced this allowance to $50. Third, the probate court allowed to the administrator and his attorney for their services the sum of $903.27, 10% of the estate. The circuit court adjudged that neither the administrator nor his attorney was entitled to any fees and disallowed this item.

The record discloses two notices by the administrator of

appeals to this court. One from the order of October 8, 1936; another from the order entered November 1, 1937. The orders covered the same subject matter, and the one of November 1 was entered in lieu of the order of October 8. After October 8 and before November 1 the administrator filed a notice of appeal and perfected it by giving bond. He contends, therefore, that the Circuit court was wholly without jurisdiction to enter the order of November 1. This contention is based on Section 50, par. (7) of the Civil Practice act, which in substance provides that judgments may be amended or vacated within 30 days from entry thereof upon filing of an affidavit showing good cause, etc. No such affidavit, it is said, was filed or cause shown. We hold, however, that the section above cited is not applicable but rather Sections 1 and 2 of the Act of June 21, 1933 (see Ill. State Bar Stats., 1937, chap. 77, pars. 82-83, p. 1907). Under this section the Circuit court had jurisdiction at any time within 30 days to set aside the order approving the appeal bond and within the same time modify the judgment as it might deem proper. Finkelstein v. Lyons, 250 Ill. 27. While not expressly so stated the effect of the order of November 1, was to set aside the order approving the appeal bond, and, as it expressly stated, to substitute the order of November 1 for that of October 8. The contention is purely technical, since whether we consider the appeal as from the order of October 8 or from the order of November 1, the final account of the administrator is before us.

It appears that April 19, 1919, Chester Corbin, a resident of Cook county, Illinois, died intestate leaving surviving him his wife, Augustine, the objector, and certain brothers and sisters as his only heirs at law and next of kin. He died while serving in the army of the United States. His entire estate consisted of a war risk insurance policy. In his application for insurance he named Lizzie Vallery Jacobs Corbin as beneficiary, describing her

appeals to this court. One from the order of October 6, 1916; another from the order entered November 1, 1917. The orders covered the same subject matter, and the one of November 1 was entered in lieu of the order of October 6. After October 6 and before November 1 the administrator filed a notice of appeal and perfected it by giving bond. He contends, therefore, that the circuit court was wholly without jurisdiction to enter the order of November 1. His contention is based on section 87, par. (7) of the civil practice act, which in substance provides that judgments may be modified or vacated within 30 days from entry thereof upon filing of an affidavit showing good cause, etc. No such affidavit, it is said, was filed or cause shown. We hold, however, that the section above cited is not applicable but rather Sections 1 and 2 of the act of June 21, 1853 (see Ill. State Bar Stats., 1917, comp. 77, pars. 22-23, p. 1907). Under this section the circuit court had jurisdiction at any time within 30 days to set aside the order approving the appeal bond and within the same time modify the judgment as it might deem proper. Kinnaiman v. Wynne, 250 Ill. 27. While not expressly so stated the effect of the order of November 1, was to set aside the order approving the appeal bond, and, as it expressly states, to substitute the order of November 1 for that of October 6. The contention is purely technical, since whether we consider the appeal as from the order of October 6 or from the order of November 1, the final account of the administrator is before us.

It appears that April 13, 1918, Chester Cribb, a resident of Cook county, Illinois, died intestate leaving surviving his his wife, Augustine, the objector, and certain brothers and sisters in his only heirs at law and next of kin. He died while serving in the army of the United States. His entire estate consisted of a war risk insurance policy. In his application for insurance he named Linnie Vallery Jacobs cousin as beneficiary, describing her

as his wife. As a matter of fact, on June 24, 1913, in New Orleans, Louisiana, he was married to the objector. They lived together as husband and wife in New Orleans until November, 1917, when he left his home and wife and came to Chicago where, while yet the lawful husband of Augustine, he married Lizzie. The Veteran's Administration Bureau, which had charge of the matter after his death, paid to Lizzie out of the proceeds of the policy $367.26, but upon discovery that she was not the lawful wife declined to make further payments. After an investigation conducted by the Bureau of Administration in Chicago, Louisiana and California, the Veteran's Bureau on January 13, 1936, by letter informed Augustine Corbin and the brothers and sisters of the deceased that the value of the policy would be paid to an administrator in Cook county, Illinois. By letter on February 13 to each of the brothers and sisters the Veteran's Administration gave notice that they were not to procure letters of administration, as that responsibility rested on Augustine Corbin, the widow. However, a sister of deceased, Priscilla Creswell, who resided in San Francisco, California, retained a law firm there which in turn employed the firm of Schofield and Wood of Chicago to represent Priscilla and file application for letters of administration. The application of Priscilla, in which she nominated Kraft, an attorney associated with Schofield and Wood, as administrator, was filed, and this firm (the public administrator having asked to be relieved) appointed Kraft administrator. In her application Priscilla named all the brothers and sister of deceased as next of kin and stated that Augustine Corbin was the widow of her brother. No children were ever born of the marriage between Augustine and deceased. March 16, 1936, an attorney associated with Schofield and Wood made proof of heirship in the Probate court, stating to the court that his

as his wife. As a matter of fact, on June 24, 1912, in New Orleans, Louisiana, he was married to the objector. They lived together as husband and wife in New Orleans until November, 1917, when he left his home and wife and came to Chicago where, while yet the lawful husband of Augustine, he married Lizzie. The Veteran's Administration Bureau, which had charge of the matter after his death, paid to Lizzie one of the proceeds of the policy $587.26, but upon discovery that she was not the lawful wife declined to make further payments. After an investigation conducted by the Bureau of Administration in Chicago, Louisiana and California, the Veteran's Bureau on January 14, 1926, by letter informed Augustine Corbin and the brothers and sisters of the deceased that the value of the policy could be paid to an administrator in Cook county, Illinois. By letter on February 12 to each of the brothers and sisters the Veteran's Administration gave notice that they were not to procure letters of administration, as that responsibility rested on Augustine Corbin, the widow. However, a sister of deceased, Priscilla Cresell, who resided in San Francisco, California, retained a law firm there which in turn employed the firm of Schofield and Wood of Chicago to represent Priscilla and file application for letters of administration. The application of Priscilla, in which she nominated herself, an attorney associated with Schofield and Wood, as administrator, was filed, and this firm (the public administrator having asked to be relieved) appointed Kraft administrator. In her application Priscilla named all the brothers and sister of deceased as next of kin and stated that Augustine Corbin was the widow of her brother. No children were ever born of the marriage between Augustine and deceased. Never 16, 1936, an attorney associated with Schofield and Wood made proof of heirship in the probate court, stating to the court that his

testimony was based upon information furnished to him by Priscilla Creswell, and an order of heirship was thereupon entered of record which has never been set aside. It appears that no notice of this proceeding was given the widow objector as required by rules of the Probate court.

October 16, 1936, the administrator filed a verified petition in the Probate court stating that there might be some dispute about the hearing on the proof of heirship, and that Lizzie Vallery Jacobs Corbin might claim an interest in the estate. Upon this petition he procured an order directing the administrator to notify by publication and registered mail the objector, Augustine Corbin, the brothers and sisters, and Lizzie Vallery Jacobs Corbin at her address, 1713 Erato street, New Orleans. An order was also entered referring the matter to Hayes as special commissioner. Augustine Corbin filed her appearance in the Probate court and on December 1, 1936. by her attorney, presented a petition asking the removal of Kraft as administrator, alleging that Priscilla Creswell, who nominated him, was a resident of California, and by falsely pretending she was a resident of Illinois had procured his appointment. She averred she was the sole heir, waived any right to administer and prayed the court to appoint Eugene O'Reilly as administrator de bonis non. The court entered an order denying the prayer of this petition, and she prayed an appeal to the Circuit court which (as already stated) was dismissed on her own motion.

Lizzie Vallery Jacobs Corbin did not appear before the commissioner either in person or by attorney. She has not communicated with the administrator and has not asserted any claim or interest in the estate. The administrator upon the hearing introduced evidence in support of Lizzie's claims. In particular, a marriage certificate dated August 22, 1918, indicating the marriage of

testimony was based upon information furnished to him by Priscilla Greswell, and an order of heirship was inadvertently entered of record which has never been set aside. It appears that no notice of this proceeding was given the widow objector as required by rules of the Probate court.

October 12, 1926, the administrator filed a verified petition in the Probate court stating that there might be some dispute about the hearing on the proof of heirship, and that Lizzie Valliery Jacobs Corbin might claim an interest in the estate. Upon this petition he procured an order directing the administrator to notify by publication and registered mail the objector, Augustine Corbin, the brothers and sisters, and Lizzie Valliery Jacobs Corbin at her address, 1713 Brato street, New Orleans. An order was also entered referring the matter to Hayes as special commissioner. Augustine Corbin filed her appearance in the Probate court on December 1, 1926. by her attorney, presented a petition asking the removal of Hyatt as administrator, alleging that Priscilla Greswell, who nominated him, was a resident of California, and by falsely pretending she was a resident of Illinois had procured his appointment. She averred she was the sole heir, waived any right to administer and prayed the court to appoint Eugene O'Reilly as administrator de bonis non. The court entered an order denying the prayer of this petition, and she prayed an appeal to the circuit court which (as already stated) was dismissed on her own motion.

Lizzie Valliery Jacobs Corbin did not appear before the commissioner either in person or by attorney. She has not communicated with the administrator and has not asserted any claim or interest in the estate. The administrator upon the hearing introduced evidence in support of Lizzie's claims. In particular, a marriage certificate dated August 22, 1921, indicating the marriage of

Lizzie to deceased at that time, and also the affidavit of deceased and Lizzie made at that time and their application for a marriage license. The administrator then argued that a prima facie case for Lizzie was established by reason of the presumption of law that a second marriage will be presumed to be valid in the absence of evidence that the first marriage was never dissolved by death or divorce. Augustine, however, introduced evidence in her own behalf. The commissioner filed his report recommending that the order of heirship previously entered be approved and ratified. This report was approved by the Probate court and an order entered as recommended by the commissioner. The order was entered April 22, 1937, and the same day the Probate court entered an order allowing fees to the special commissioner for his services to the amount of $374.60 and costs for the services of the stenographer upon the hearing amounting to $118.45, and directed that these items should be paid and taxed as costs against the estate. These items were paid by the administrator and he claims credit for same in his report as recasted.

In the hearing before the referee Augustine Corbin was represented by her attorney. The report of the commissioner was in her favor, and her attorney presented it to the Probate court for approval with the certificate of the referee attached showing charges to the amount that was allowed by the court. No objections were filed at that time to these charges or to the entry of the order taxing the same as costs to be paid by the administrator. No appeal was taken therefrom by the objector. The administrator therefore contends that the objector is estopped, and that the court was without jurisdiction to hear any complaint as to these items upon consideration of the final account. The order of the Probate court taxing these charges as costs and ordering the

Lizzie to deceased it took time, and also the affidavit of deceased and Lizzie made at that time and their application for a marriage license. The administrator then argued that a prima facie case for Lizzie was established by reason of the presumption of law that a second marriage will be presumed to be valid in the absence of evidence that the first marriage was never dissolved by death or divorce. Appellee, however, introduced evidence in her own behalf. The commissioner filed his report recommending that the order of February previously entered be approved and modified. This report was approved by the probate court and an order entered as recommended by the commissioner. The order was entered April 22, 1917, and the same day the probate court entered an order allowing fees to the special commissioner for his services to the amount of $374.80 and costs for the services of the stenographer upon the hearing according to Bill.43, and directed that these items should be paid and taxed as costs against the estate. These items were paid by the administrator and he claims credit for same in his report as requested.

In the hearing before the referee Augustine Corbin was represented by her attorney. The report of the commissioner was in her favor, and her attorney presented it to the probate court for approval with the certificate of the referee attached showing charges to the amount that was allowed by the court. No objections were filed at that time to these charges or to the entry of the order taking the same as costs to be paid by the administrator. No appeal was taken after from by the objector. The administrator therefore contends that the objector is estopped, and that the court was without jurisdiction to hear any complaint as to these items upon consideration of the final account. The order of the probate court taking such charges in costs and directing the

administrator to pay the same was entered the same day as the order approving the commissioner's report. No rule was entered to file objections to these charges and none was filed. The attorney for objector consented to the order approving the report. He did not consent to the order directing that these items be taxed as costs against the estate. No formal notice was given the objector or her attorney of the application to tax these items as costs, and it is not established by the evidence that the attorney had actual notice. We hold the objector was not estopped nor the court without jurisdiction to consider her objections to these items.

The charge of the referee was made in a lump sum. His charges were not itemized. By statute his fees as a referee of the Probate court and stenographer's charges are to be the same as provided by law for like services by Masters in Chancery. (Ill. State Bar Stats., 1937, chap. 117, sec. 3, par. 7, p.2609.) We hold that the Circuit court did not err in taking jurisdiction to consider these items and in reducing them to the amount stated in the order.

Although the objector waived her appeal from the order of the Probate court denying the prayer of her petition for the removal of the administrator in the Circuit court, she insisted on her objection to the allowance of an item of $963.27 in full payment of compensation to the administrator and his attorney. The Circuit court upon the theory that the administrator was guilty of unauthorized interference and intermeddling with the estate by contesting the heirship disallowed this claim entirely. On the facts as heretofore recited, we hold that the penalty inflicted was too severe. While of the opinion that the estate and the administrator could have been well protected by notice to Lizzie

administrator to pay the same was entered the same day as the order approving the commissioner's report. No rule was entered to file objections to the charges and none was filed. The attorney for objector consented to the order approving the report. He did not consent to the order directing that these items be taxed as costs against the estate. No formal notice was given the objector or her attorney of the application to tax these items as costs, and it is not established by the evidence that the attorney had actual notice. We hold the objector was not estopped nor the court without jurisdiction to consider her objections to these items.

The charge of the referee was made in a lump sum. His charges were not itemized. By statute his fees as a referee of the Probate court and stenographer's charges are to be the same as provided by law for like services by masters in chancery. (Ill. State Bar Stats., 1937, ch. 117, sec. 5, par. 7, p.2000.) We hold that the Circuit court did not err in taking jurisdiction to consider these items and in reducing them to the amount stated in the order.

Although the objector waived her appeal from the order of the Probate court denying the prayer of her petition for the removal of the administrator in the Circuit court, she insists on her objection to the allowance of an item of $983.77 in full payment of compensation to the administrator and his attorney. The Circuit court upon the theory that the administrator was guilty of unauthorized interference and intermeddling with the estate by commencing the bankruptcy disallowed this claim entirely. On the facts as hereinafter recited, we hold that the penalty inflicted was too severe. Taking the opinion that the estate and the administrator could have been well protected by notice to Lizzie

Vallery Jacobs Corbin at her known address, 1713 Erato street, New Orleans, Louisiana, of the presentation of the final report of the administrator, the services of the administrator and his attorney were not wholly without benefit to the estate. The objector cites In Re Estate of Busby, 288 Ill. App. 500, and Whittemore v. Coleman, 239 Ill. 450, to the point that administrators and executors who have been negligent or derelict may be deprived of their compensation. We entertain no doubt that it is the duty of an administrator or executor as between contesting heirs, devisees or legatees for distribution of the estate to maintain an impartial attitude and not permit one claimant to contest against another at the expense of the estate. Foltz v. Boone, 107 Ohio St. 562, 140 N. E. 761; Roach v. Coffey, 73 Calif. 281, 14 Pac. 840; and Goldtree v. Thompson, 83 Calif. 420, 23 Pac. 383, are cases which announce this general rule which we cannot doubt would be applied by the courts of Illinois. But while the court could properly deny compensation for attorney's fees in contesting the heirship, we do not think the administrator and his attorney should be penalized for that mistake of judgment to the extent of entirely depriving them of compensation. Indeed, at one time on the hearing the attorney for the objector admitted that the necessary services performed by them in behalf of the estate were worth $500. We hold that the Circuit court in sustaining the objection to the account should have directed that an allowance be made on this item to that amount. The order is reversed and the matter remanded to the Circuit court with directions to enter an order in conformity with the views herein expressed and certify said order to the Probate court of Cook county.

REVERSED IN PART AND REMANDED
WITH DIRECTIONS.

McSurely, P. J., and O'Connor, J., concur.

Valley Lodge Co-op at 407 Lake Avenue, 1713 Irwin street, New Orleans, Louisiana, at the presentation of the final report of the administrator, the services of the administrator and his attorney were not wholly without benefit to the estate. The inspector cites in re Estate of Kelly, 58 Ill. App. 3d, and Whittemore v. Coleman, 289 Ill. App. 3d, to the point that administrators and executors are entitled to compensation or benefit for the services rendered by them. We understand the rule that it is the duty of an administrator or executor as between contending heirs, devisees or legatees for distribution of the estate to maintain an impartial attitude and not permit one claimant to contest against another at the expense of the estate. Kelly v. Boone, 107 Ohio St. 352, 140 N. E. 761; Moore v. Gates, 73 Conn. 281, 14 Atl. 340; and Lightner v. Thompson, 5 Dallas, 424, 4 Pac. 339, are cases which announce this general rule which we cannot doubt would be applied by the courts of Illinois. But while the court could properly deny compensation for attorney's fees in contesting the claimant, we do not think the administrator and his attorney should be penalized for that mistake of judgment to the extent of entirely depriving them of compensation. Indeed, at one time on the hearing the attorney for the objector admitted that the necessary services performed by them in behalf of the estate were worth $500. We note that the circuit court in assessing the objection to the account should have directed that an allowance be made on this item to that account. The order is reversed and the matter remanded to the circuit court with directions to enter an order in conformity with the views herein expressed and certify said order to the Lawrence County of Cook County.

REVERSED IN PART AND REMANDED WITH DIRECTIONS.

McGuire, P. J., and O'Connor, J., concur.

40054

FANNIE FRIEND,
Appellant,

vs.

HOTEL DEL PRADO COMPANY,
Appellee.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

296 I.A. 647

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In an action for alleged negligence whereby plaintiff was injured and upon trial by the court at the close of all the evidence there was a finding for defendant and judgment thereon, from which plaintiff appeals.

The complaint, filed June 30, 1936, in the first count alleged in substance that on December 2, 1935, defendant owned, operated and controlled a hotel at 53rd street and Hyde Park boulevard in Chicago; that plaintiff resided in the hotel as a tenant; that on the front part of the hotel was a sidewalk leading to an entrance used in common by plaintiff and other tenants and guests and controlled by defendant; that defendant carelessly and negligently allowed this sidewalk to become and remain in a dangerous and unsafe condition and failed to make this condition known to plaintiff, although defendant knew or by ordinary care would have known thereof; that plaintiff did not know of this unsafe condition and was walking upon the sidewalk in the exercise of due care when she tripped or fell in a hole in the sidewalk, whereby she was thrown, fell and was injured.

In the second count plaintiff averred that defendant exercised and obtained control over the sidewalk, steps, landing or platform; that it was defendant's duty to keep the same in safe condition for the ingress and egress of people lawfully using the premises; and that defendant negligently failed so to do but permitted the same to remain in an unsafe condition, in that holes

40054

FANNIE BRIGGS,
Appellant,

vs.

HOTEL DEL PRADO COMPANY,
Appellee.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

296 I.A. 647

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In an action for alleged negligence whereby plaintiff was injured and upon trial by the court at the close of all the evidence there was a finding for defendant and judgment thereon, from which plaintiff appeals.

The complaint, filed June 30, 1936, in the first count alleged in substance that on December 2, 1935, defendant owned, operated and controlled a hotel at 53rd street and Hyde Park boulevard in Chicago; that plaintiff resided in the hotel as a tenant; that on the front part of the hotel was a sidewalk leading to an entrance used in common by plaintiff and other tenants and guests and controlled by defendant; that defendant carelessly and negligently allowed said sidewalk to become and remain in a dangerous and unsafe condition and failed to make this condition known to plaintiff, although defendant knew or by ordinary care would have known thereof; that plaintiff did not know of this unsafe condition and was walking upon the sidewalk in the exercise of due care when she tripped or fell in a hole in the sidewalk, whereby she was thrown, fell and was injured.

In the second count plaintiff averred that defendant exercised and obtained control over the sidewalk, steps, landing or platform; that it was defendant's duty to keep the same in safe condition for the invitees and guests of people lawfully using the premises; and that defendant negligently failed so to do and permitted the same to remain in an unsafe condition, in that holes

were permitted to exist so that persons unfamiliar with the same would be apt to stumble and fall, all of which in the exercise of reasonable care defendant would have known; and that plaintiff while using the passageway with due care was thrown with great force and violence, injuring her.

The answer of defendant denied the allegations of negligence on its part and also set up affirmatively that the accident took place on a public sidewalk which was under the control of the City of Chicago; that it was the duty of the City, not defendant, to keep the same in reasonably safe condition; that defendant was not in control, in charge or in possession of the sidewalk, did not construct it and was not in control of it although it was adjacent to its premises, etc.

The facts (practically undisputed) are that defendant owns and controls a hotel at Hyde Park boulevard and 53rd street in Chicago. In front of the hotel is a sidewalk which extends along the south side of 53rd street and on the north side of the hotel; 53rd street extends east and west; the sidewalk is adjacent to the premises, is about 18 feet wide from the building line to the curb. One of the entrances to the hotel is on the north side of it and about the center of the building facing 53rd street; this entrance was used for automobile and other patrons of the hotel; the entrance consisted of a double door at the building line; outside the door and extending from the doorway to the curb line of the street was a canopy erected by defendant; the canopy was supported by iron posts set in concrete and it was covered on top by a canvas, in which on the sides spaces were left for east and west pedestrians on 53rd street to pass through and under it. The same situation had existed for about 9 years.

Defendant employed a doorman whose duty it was to meet patrons at their automobiles and assist them in and out of the

were permitted to assist at that persons motorcycle with the case would be met to attempt and fail, all of which in the exercise of reasonable care defendant would have known; and that plaintiff while using the passageway with due care was thrown with great force and violence, injuring her.

The answer of defendant denied the allegations of negligence on its part and also set up affirmatively that the accident took place on a public sidewalk which was under the control of the City of Chicago; that it was the duty of the city, not defendant, to keep the same in reasonably safe condition; that defendant was not in control, in charge or in possession of the sidewalk, did not construct it and was not in control of it although it was adjacent to its premises, etc.

The facts (stipulatively undisputed) are that defendant owns and controls a hotel at the northeastcorner and 53rd street in Chicago. In front of the hotel is a sidewalk which extends along the south side of 53rd street and on the north side of the hotel; 53rd street extends east and west; the sidewalk is adjacent to the premises, is about 12 feet wide from the building line to the curb. One of the entrances to the hotel is on the north side of it and about midway of the building facing 53rd street; this entrance was used for automobile and other patrons of the hotel; the entrance consisted of a double door at the building line; outside the door and extending from the doorway to the curb line of the street was a canopy erected by defendant; the canopy was supported by iron posts set in concrete and it was covered on top by a canvas, in which on the sides spaces were left for cars and pedestrians on 53rd street to pass through and under it. The same situation had existed for about 8 years.

Defendant employed a doorman whose duty it was to meet patrons at their automobiles and assist them in and out of the

hotel. Each day an employee of the hotel swept the space under the canopy at least once and sometimes two or three times; if this employee was not on duty the doorman would perform this service.

On the day of the accident a doorman named Stewart was on duty; he had been employed by the hotel for about 9 years. The sidewalk under the canopy was made of concrete divided into 6 blocks which were about 5 feet by 6 feet in dimensions, separated by cross marks made with a trowel indented in the concrete at the time it was laid; from the door to the curb the space on the street was two of these blocks in width and three blocks long.

Plaintiff had resided in defendant hotel 9 years prior to December 2, 1935; she owned an automobile which was driven by a chauffeur, Nicholas Kanderfeld; on that day, after doing some shopping, plaintiff was driven to the hotel arriving at about 5:15 p. m.; she approached from the west and her car stopped at the usual place in front of the canopy at the 53rd street entrance; the doorman came out, opened the door of her car, took some packages which he started to carry toward the building, plaintiff accompanying him; her testimony is to the effect that when she had gone about 5 feet, or to the first cross line on the sidewalk, her foot caught in a hole and she was thrown to the sidewalk, falling toward the building; she screamed and the chauffeur stopped his car and ran to her, and about this time the doorman assisted her to arise; she says that lying on the sidewalk she looked back to see the cause of her fall and saw the hole in which her heel had caught; assisted by the chauffeur and the bell-boy she was taken through the drug store in the hotel to the elevator and thence to her apartment on the 5th floor; she says she was carried from the elevator to her apartment and placed upon a divan; Dr. Goldsmith, a practicing physician, was called, also her brother, and they assisted her into bed and her medical needs were attended to; she was afterward taken to a hospital, x-rayed and placed in a cast

hotel. Each day an employee of the hotel swept the space under the canopy at least once and scrubbed the or other litter; if this employee was not on duty the doorman would perform his service.

On the day of the accident a janitor named Stewart was on duty; he had been employed by the hotel for about 2 years. The sidewalk under the canopy was made of concrete flags in 4 blocks which were about 4 feet by 4 feet in dimensions, separated by cross marks made with a trowel inserted in the concrete at the time it was laid; from the door to the curb the space on the street was two of these blocks in width and three blocks long.

Plaintiff had resided in Detroit about 2 years prior to December 4, 1933; she owned an automobile which was driven by a chauffeur, Florence Sommerfeld; on that day, after dining was shopping, plaintiff was driven to the hotel arriving at about 3:15 p. m.; she approached from the west and her car stopped at the usual place in front of the canopy at the 52nd street entrance; the doorman came out, opened the door of her car, took some packages which he started to carry toward the building, plaintiff accompanying him; her testimony is to the effect that when she had gone about 2 feet, or in the first cross line on the sidewalk, her foot caught in a crack, and she was thrown to the sidewalk, falling toward the building; she screamed and the chauffeur stopped the car and ran to her, and about the time the doorman motioned her to arise; she says that lying on the sidewalk she looked back to see the cause of her fall and saw the hole in which her heel had caught; assisted by the chauffeur and the bell-boy she was taken through the drug store in the lobby to the elevator and thence to her apartment on the 5th floor; she says she was carried from the elevator to her apartment and placed upon a divan; Dr. Cummins, a practicing physician, was called, also her husband, who assisted her into bed and her medical bills were considerable; she was afterward taken to a hospital, x-rayed and placed in a cast

for a broken hip.

The sidewalk in question belongs to the City of Chicago. Defendant for many years had assumed a certain control and supervision over that portion of it which was laid from this entrance to the curb. The duties of the doorman were in part to keep the sidewalk space under the canopy in a clean and proper condition for the use of patrons of that doorway of the hotel; he was to meet incoming and outgoing cars and assist the occupants in and out of the hotel over this particular space and under the canopy. The only other persons using this space were pedestrians going east and west on the sidewalk through the space in the sides of the canopy. The medical testimony tended to show that plaintiff's injuries were permanent. It also appeared plaintiff incurred expenses by reason of her injury amounting to about $2000; that she did not know of any dangerous condition of the sidewalk, and that the condition in which it was on the day of the accident had existed for a long time.

December 2, 1935, was a dry, clear day, no snow, ice or water of any kind on the ground and no foreign substance of any kind was visible upon the sidewalk; plaintiff habitually used this 53rd street entrance and walked over this sidewalk nearly every day during the period of her tenancy; she fell at a point on the sidewalk directly under the canopy and about 4 feet from the curb line. The City of Chicago was not made a defendant in this case.

The theory of plaintiff is that defendant was liable because it neglected its duty to keep the sidewalk in a reasonably safe condition for the use of plaintiff; that plaintiff was not negligent and fell as a result of defendant's negligence and is therefore entitled to recover.

On the other hand defendant contends that as a matter of law under the evidence there was no duty upon it to keep the

for a broken hip.

The sidewalk in question belongs to the city of Chicago. Defendant for many years had assumed a certain control and supervision over that portion of it which was laid from this entrance to the curb. The duties of the doorman were in part to keep the sidewalk space under the canopy in a clean and proper condition for the use of patrons of that doorway of the hotel; he was to meet incoming and outgoing cars and assist the occupants in and out of the hotel over this particular space and under the canopy. The only other porte cochere using this space were pedestrians going east and west on the sidewalk through the space in the middle of the canopy. The medical testimony tended to show that plaintiff's injuries were permanent. It also appeared plaintiff incurred expenses by reason of her injury amounting to about $2000; that she did not know of any dangerous condition of the sidewalk, and that the condition in which it was on the day of the accident had existed for a long time.

December 2, 1922, was a dry, clear day, no snow, ice or water of any kind on the ground and no foreign substance of any kind was visible upon the sidewalk; plaintiff habitually used this 53rd street entrance and walked over this sidewalk nearly every day during the period of her tenancy; she fell at a point on the sidewalk directly under the canopy and about 4 feet from the curb line. The City of Chicago was not made a defendant in this case.

The theory of plaintiff is that defendant was liable because it neglected its duty to keep the sidewalk in a reasonably safe condition for the use of plaintiff; that plaintiff was not negligent and fell as a result of defendant's negligence and is therefore entitled to recover.

On the other hand defendant contends that as a matter of law under the evidence there was no duty upon it to keep the

sidewalk in repair. Further, that as a matter of fact the sidewalk was not in disrepair, and that the accident to plaintiff was the result of her own negligence.

Two questions are disclosed by the record, either of which is determinative of this appeal: First, whether defendant as a matter of law could be held for the injury plaintiff received; and, second, whether as a matter of fact the injury plaintiff received was the result of negligence on the part of another or the result of plaintiff's negligence in failing to exercise due care.

It is the well settled rule of law in Illinois that an abutting owner, in the absence of special circumstances, is under no duty to keep the sidewalk in front of his premises in safe condition, and that this duty rests upon the city rather than the abutting owner. The rule was well stated in the comparatively early case of Gridley v. City of Bloomington, 88 Ill. 554, where the Supreme court said:

"It is plain defendant has no other interest in the street in front of his property than any other citizen of the municipality. The same is true of the sidewalk. It is a part of the street set apart for the exclusive use of persons traveling on foot, and is as much under the control of the municipal government as the street itself. *** The sidewalk, as was declared in the case cited (40 Ill. 211) is as much a public highway, free to the use of all, as the street itself, and, upon principle it follows the citizen cannot be laid under obligations, under our laws, to keep it free from obstructions in front of his property at his own expense, any more than the street itself."

A later case to the same effect is Burns v. Kunz, 290 Ill. App. 278. The plaintiff relies on Steinberg v. Northern Illinois Telephone Co., 260 Ill. App. 538, and also cites Calvert v. Springfield Electric Light and Power Co., 231 Ill. 290; Mueller v. Phelps, 252 Ill. 630; Rieck v. Great Atlantic and Pacific Tea Co., 268 Ill. App. 613; Pabst v. Hillmans, 293 Ill. App. 547, and 45 Corpus Juris, 834. Most reliance seems to be placed on the Steinberg case. There the plaintiff was injured by falling down a stairway which led from the street to the telephone exchange of defendant,

sidewalk in repair. Further, that as a matter of fact the sidewalk was not in disrepair, and that the accident to plaintiff was the result of her own negligence.

Two questions are disclosed by the record, either of which is determinative of this appeal: First, whether defendant as a matter of law could be held for the injury plaintiff received; and, second, whether as a matter of fact the injury plaintiff received was the result of negligence on the part of another or the result of plaintiff's negligence in failing to exercise due care.

It is the well settled rule of law in Illinois that an abutting owner, in the absence of special circumstances, is under no duty to keep the sidewalk in front of his premises in safe condition, and that this duty rests upon the city rather than the abutting owner. The rule was well stated in the comparatively early case of Gridley v. City of Bloomington, 88 Ill. 554, where the supreme court said:

"It is plain defendant has no other interest in the street in front of his property than any other citizen of the municipality. The same is true of the sidewalk. It is a part of the street set apart for the exclusive use of persons traveling on foot, and is as much under the control of the municipal government as the street itself. *** The sidewalk, as was declared in the case cited (40 Ill. 211) is as much a public highway, free to the use of all, as the street itself, and, upon principle it follows the citizen cannot be laid under obligations, under our laws, to keep it free from obstructions in front of his property at his own expense, any more than the street itself."

A later case to the same effect is Burke v. Lunz, 290 Ill. App. 276. The plaintiff relies on Steinberg v. Northern Illinois Telephone Co., 240 Ill. App. 534, and also cites Delvart v. Springfield Electric Light and Power Co., 231 Ill. 290; Kneller v. Kinlos, 252 Ill. 630; Hicok v. Great Atlantic and Pacific Tea Co., 268 Ill. App. 812; Pabst v. Hillman, 208 Ill. App. 347, and 45 Corpus Juris, 834. Most reliance seems to be placed on the Steinberg case. There the plaintiff was injured by falling down a stairway which led from the street to the telephone exchange of defendant,

located in the second story of the building of which the stairs were a part, and were the only means of ingress and egress to the exchange. The court said that the evidence tended to show that defendant was in control of the hall and stairway where the accident occurred, but added that whether defendant had control of the hall and stairway was immaterial. The court said:

"An invitation to enter premises carries with it the duty toward the person invited to provide reasonably safe means of ingress and egress. (45 C. J. 834 Negligence.) An owner or occupant of land who, by invitation, express or implied, induces or leads others to go upon premises for any lawful purpose is liable for injuries occasioned by his negligent failure to keep the land or its approaches in a reasonably safe condition. (Calvert v. Springfield Electric Light & Power Co., 231 Ill., 290; Bennett v. Louisville & Nashville R. Co., 102 U. S. 577 (26 U.S.L.Ed. 235); 20 R. C. L. Negligence 56-57). Even a trespasser on land has been held to be liable to his injured invitees. (Collins v. Hazel Lumber Co., 54 Wash. 524, 103 Pac. 798.) * * *."

The case, however, involved a private stairway used by defendant for access to its premises. Manifestly, such a case is clearly distinguishable from one where, as here, a plaintiff is invited to make use of a public street. The Calvert case involved a hole on the roof of defendant's building. The Mueller case is a case of hallways leading to elevators in defendant's property. The Pabst case was that of a stringbean on the floor of defendant's store. The Rieck case involved slipping of plaintiff on a green bean or pea in the store of defendant. No one of these cases, nor any of the cases cited in support of the quotation from 45 C.J.834, involved a public street or sidewalk from which the plaintiff entered the premises. We are of the opinion, therefore, that the trial court was justified in holding as a matter of law that plaintiff could not recover. This is determinative of this appeal.

No findings of fact were submitted. The record does not inform us whether the decision of the court was based on a proposition of law or upon findings of fact. Every presumption is, of course, in favor of the judgment. Under the former practice the finding of the trial court on issues of fact was entitled to the same

located in the second story of the building of which the stairs were a part, and were the only means of ingress and egress to the exchange. The court said that the evidence tended to show that defendant was in control of the hall and stairway where the accident occurred, but added that whether defendant had control of the hall and stairway was immaterial. The court said:

> "An invitation to enter premises carries with it the duty toward the person invited to provide reasonably safe means of ingress and egress. (45 C. J. 154 Negligence.) An owner or occupant of land who, by invitation, express or implied, induces or leads others to go upon premises for any lawful purpose is liable for injuries occasioned by his negligent failure to keep the land or its appurtenances in a reasonable safe condition. (Galvert v. Springfield Electric Light & Power Co., 221 Ill., 290; Jennett v. Louisville & Nashville R. Co., 102 S. W. 577 (26 C.J.S., 353); 20 R. C. L. Negligence 1-27). Even a trespasser on land has been held to be liable to his invited invitees. (Collins v. Hazel Dumber Co., 54 Wash. 524, 103 Pac. 798.) * * *."

The case, however, involved a private stairway used by defendant for access to its premises. Manifestly, such a case is clearly distinguishable from one where, as here, a plaintiff is invited to make use of a public street. The Galvert case involved a hole on the roof of defendant's building. The Jennett case is a case of railways leading to elevators in defendant's property. The Paget case was that of a sliding door on the floor of defendant's store. The Rieck case involved alighting of plaintiff on a green bean or pea in the store of defendant. In one of these cases, nor any of the cases cited in support of the quotation from 45 C.J. 834, involved a public street or sidewalk from which the plaintiff entered the premises. We are of the opinion, therefore, that the trial court was justified in holding as a matter of law that plaintiff could not recover. This is determinative of this appeal.

No findings of fact were submitted. The record does not inform us whether the decision of the court was based on a proposition of law or upon findings of fact. Every presumption is, of course, in favor of the judgment. Under the former practice the finding of the trial court on issues of fact was entitled to the same

weight as the verdict of a jury, (Keating v. Springer, 44 Ill.App. 547, and Paterson v. Whitney, 67 Ill. App. 290) and a judgment based upon such verdict or finding would be reversed by this court only where it was against the clear and manifest weight of the evidence. Section 64 of the Civil Practice Act provides that no special findings of fact shall be necessary in any case at law tried without a jury to support the judgment or as a basis of review, and we have held that the rule under the former practice is applicable in such cases. Weisberg v. U. S. Casualty Co., 288 Ill. App. 78). We have already held as a matter of law that there was no evidence here tending to show any defect in the sidewalk with respect to which defendant owed a duty to plaintiff. The issues of fact under the pleadings were whether there was a hole in the sidewalk as alleged, whether defendant was negligent with respect thereto, and whether plaintiff was, under the evidence, in the exercise of due care at the time she received the injury. Nothing appearing to the contrary, we must assume that the finding of the trial Judge on all these issues of fact was against the plaintiff and unless it appears that as to each and all of these issues of fact the finding is clearly and manifestly against the evidence the judgment must be affirmed. Even if we assume (which the evidence in our opinion would not justify) that a preponderance thereof justified an inference that the sidewalk was defective, there would still remain the controlling question of whether plaintiff at the time she received the injury was in the exercise of due care. The evidence in this record would not justify such a finding by this court. Plaintiff, as others, had walked over this sidewalk precisely at this place for many years; it does not appear her eyesight was defective; she received the injury in broad daylight, at a time and in a place where there was nothing to obstruct her view

weight as the verdict of a jury, (Martina v. Gardner, 44 Ill.App. 547, and Paterson v. Pitney, 57 Ill. App. 290) and a judgment based upon such verdict or finding could be reversed by this court only where it was against the clear and manifest weight of the evidence. Section 64 of the civil practice Act provides that no special findings of fact shall be necessary in any case at law tried without a jury to support the judgment or as a basis of review, and we have held that the rule under the former practice is applicable in such cases. Gilbert v. U. S. Casualty Co., 258 Ill. App. 78). We have already held as a matter of law that there was no evidence here tending to show any defect in the sidewalk with respect to which defendant owed a duty to plaintiff. The issues of fact under the pleadings were whether there was a hole in the sidewalk as alleged, whether defendant was negligent with respect thereto, and whether plaintiff was, under the evidence, in the exercise of due care at the time she received the injury. Nothing appearing to the contrary, we must assume that the finding of the trial judge on all these issues of fact was against the plaintiff and unless it appears that as to each and all of these issues of fact the finding is clearly and manifestly against the evidence the judgment must be affirmed. Even if we assume (which the evidence in our opinion could not justify) that a preponderance thereof justified an inference that the sidewalk was defective, there would still remain the controlling question of whether plaintiff at the time she received the injury was in the exercise of due care. The evidence in this record could not justify such a finding by this court. Plaintiff, as claims, had walked over this sidewalk precisely at this place for many years; it does not appear her eyesight was defective; she received the injury in broad daylight, at a time and in a place where there was nothing to obstruct her view

as she approached the entrance to the hotel. It is suggested by her attorney that the defects in the sidewalk were so slight that they were not apparent to her upon inspection. If this were true, then (assuming defendant had a duty to inspect) it is difficult to see how defendant could be held to be guilty of negligence. We hold that as a matter of law plaintiff was not entitled to recover and that upon the issues of fact this court cannot say that the findings of the trial court are clearly and manifestly against the evidence.

The judgment is affirmed.

AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

as she approached the entrance to the hotel. It is suggested by her attorney that the defects in the sidewalk were so slight that they were not apparent to her upon inspection. If this were true, then (assuming defendant had a duty to inspect) it is difficult to see how defendant could be held to be guilty of negligence. We hold that as a matter of law plaintiff was not entitled to recover and that upon the issues of fact this court cannot say that the findings of the trial court are clearly and manifestly against the evidence.

The judgment is affirmed.

AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

40211

MARIE A. PHILLIPS,
Appellee,

vs.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, a Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

S/A

296 I.A. 647

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In an action on an insurance policy issued on the life of Sylvester Phillips in favor of plaintiff, his wife, and upon trial by the court, there was a finding for plaintiff in the sum of $6000 and judgment, from which defendant appeals. Findings of fact and propositions of law were submitted by defendant and the rulings of the court thereon appear in the record. The facts were presented by a written stipulation of the parties and no other evidence was offered or received.

The insured died September 10, 1933, after an illness of a few days from a ruptured appendix. The sole defense interposed was that the policy had lapsed prior to the death of the assured for non-payment of premiums. The pleadings present two issues of fact. The first is whether the premium was in fact tendered to defendant within the time limited in the policy; the second, assuming it was not so tendered, whether defendant by its conduct waived the delay in payment and is estopped to assert non-payment.

The assured applied for the policy January 20, 1932. It was issued to him January 22, 1932. It bears an endorsement of an agreement for two-year preliminary term insurance from January 20, 1932, to January 20, 1934. The premium was $18.75, payable quarterly on the 20th day of April, July, October and January, until two full years premiums should be paid. By the terms of the policy the premiums were payable in advance at the home office

40211

MARIE A. PALMIER,
Appellee,

vs.

THE EQUITABLE LIFE ASSURANCE SOCIETY
OF THE UNITED STATES, a corporation,
Appellant.

Appeal from Superior
Court of Cook.

PA
2961.647

MR. JUSTICE ALSCHULER DELIVERED THE OPINION OF THE COURT.

In an action on an insurance policy issued on the life of Sylvester Palmier in favor of plaintiff, his wife, and upon trial by the court, there was a finding for plaintiff in the sum of $5000 and judgment, from which defendant appeals. Findings of fact and propositions of law were submitted by defendant and the rulings of the court thereon appear in the record. The facts were presented by a written stipulation of the parties and no other evidence was offered or received.

The insured died December 10, 1922, after an illness of a few days from a ruptured appendix. The sole defense interposed was that the policy had lapsed prior to the death of the insured for non-payment of premiums. The pleadings present two issues of fact. The first is whether the premium was in fact tendered in defendant within the time limited in the policy; the second, assuming it was not so tendered, whether defendant by its conduct waived the delay in payment and is estopped to assert non-payment.

The insured applied for the policy January 20, 1922. It was issued to him January 27, 1922. It bears an endorsement of an agreement for two-year preliminary term insurance from January 20, 1922, to January 20, 1924. The premium was $1.72, payable quarterly on the 20th day of April, July, October and January, until two full years premiums should be paid. By the terms of the policy the premiums were payable in advance at the home office

of defendant or to any authorized agent. A period of grace of 31 days was provided for the payment of every premium after the first. The policy also provided that failure to pay any premium as agreed should cause a default and the policy was to cease except as stated in the provision thereof for grace, but it might be reinstated at any time upon proof satisfactory to defendant of insurability and payment of overdue premiums with 5% interest.

The insured paid all the premiums which fell due prior to July 20, 1933. These payments were made by checks, but neither plaintiff nor defendant have records showing the exact dates on which the checks were mailed by the assured or received by the defendant. The records of the assured were inadvertently destroyed and it was the practice of defendant to destroy the envelopes in which payments were received after six months from the time of receiving them. It was defendant's custom to accept payments of premiums tendered by mail if the tender reached its office 5 days after the last day of grace. It was not usual for defendant to inform policyholders of this custom, and it is not known whether the insured had knowledge thereof.

About the middle of August, 1933, the insured moved temporarily from 2343 Rosemont avenue, Chicago, his address when the policy was issued, to 1536 Hood avenue, where he was living when taken ill about Seprember 1, 1933. September 8th he was taken to the hospital and died in an operation, as already stated, September 10th.

The facts stipulated show that the insured tendered payment of the premium of July 20, 1933, by a check, which is attached to the stipulation and marked plaintiff's exhibit 2. This check is signed by the insured and is drawn on the same account as checks theretofore given in payment of previous premiums. The check is

of defendant or to any authorized agent. A period of grace of 31 days was provided for the payment of every premium after the first. The policy also provided that failure to pay any premium as agreed should cause a default and the policy was to cease except as stated in the provision thereof for grace, but it might be reinstated at any time upon proof satisfactory to defendant of insurability and payment of overdue premiums with 5% interest.

The insured paid all the premiums which fell due prior to July 20, 1933. These payments were made by checks, but neither plaintiff nor defendant have records showing the exact dates on which the checks were mailed by the insured or received by the defendant. The records of the assured were inadvertently destroyed and it was the practice of defendant to destroy the envelopes in which payments were received after six months from the time of receiving them. It was defendant's custom to accept payments of premiums tendered by mail if the tender reached its office 5 days after the last day of grace. It was not usual for defendant to inform policyholders of this custom, and it is not known whether the insured had knowledge thereof.

About the middle of August, 1933, the insured moved temporarily from 5343 Rosemont avenue, Chicago, his address when the policy was issued, to 1536 Ford avenue, where he was living when taken ill about September 1, 1933. September 5th he was taken to the hospital and died in an operation, as already stated, September 10th.

The facts stipulated show that the insured tendered payment of the premium of July 20, 1933, by a check, which is attached to the stipulation and marked plaintiff's exhibit A. This check is signed by the insured and is drawn on the same account as checks theretofore given in payment of previous premiums. The check is

dated August 20, 1933. The clearing house stamp upon it shows it was paid August 31, 1933. The impression of a rubber stamp used by defendant's cashier to indicate on what date checks were received at defendant's office shows "August 28, 1933."

It was the custom of defendant to send to each policy holder 10 days before the last day of grace for the payment of any premium a remainder notice on a form used by defendant for that purpose to the effect that the period of grace would expire and also to enchose with this a self-addressed envelope to be used by the policyholder in remitting the premium. Such a reminder notice to the assured as to the payment of this premium on this policy and such an envelope were produced from the files of defendant. The rubber stamp impression on each of these indicates that the same were received at the mail desk at the cahsier's office on August 28, 1933, and referred to the restoration department of defendant. In the left-hand corner of the envelope appear in print the words, "If not delivered within 5 days return to". Underneath these printed words appears in the handwriting of the assured his own signature, - "S. J. Phillips, 2343 Rosemont, Chgo., Ill." The figure "2" apparently has been clipped out, but the envelope bears the stamp of the postoffice, "Chicago, August 26, 10:30 P.M., 1933, Illinois."

Plaintiff in her pleading disclaims knowledge of the time when this tender of payment was made. Defendant avers in its pleading that the tender was not made until 6 days after the end of the grace period. Defendant admits that the burden of proof as to the issue was upon it, but argues that the proof is sufficient to show that the tender of premium was not made within the grace period. We are disposed to hold that the evidence was <u>prima facie</u> sufficient to establish as a fact that the tender of payment of the premium was not made until after the expiration of the period of

dated August 20, 1933. The clearing house stamp upon it shows it was paid August 21, 1933. The impression of a rubber stamp used by defendant's cashier to indicate on what date checks were received at defendant's office shows "August 22, 1933."

It was the custom of defendant to send to each policy holder 10 days before the last day of grace for the payment of any premium a reminder notice on a form used by defendant for that purpose to the effect that the period of grace would expire and also to enclose with this a self-addressed envelope to be used by the policyholder in remitting the premium. Such a reminder notice to the assured as to the payment of this premium on this policy and such an envelope were produced from the files of defendant. The rubber stamp impression on each of these indicates that the same were received at the home office desk at the cashier's office on August 28, 1933, and referred to the reactivation department of defendant. In the left-hand corner of the envelope appear in print the words, "If not delivered within 5 days return to". Underneath these printed words appears in the handwriting of the assured his own signature, - "E. C. Phillips, 2343 Rosemont, Chgo., Ill." The figure "2" apparently has been clipped out, but the envelope bears the stamp of the postoffice, "Chicago, August 26, 10:30 P.M., 1933, Illinois."

Plaintiff in her pleading disclaims knowledge of the time when this tender of payment was made. Defendant avers in its pleading that the tender was not made until 6 days after the end of the grace period. Defendant admits that the burden of proof as to the issue was upon it, but argues that the proof is sufficient to show that the tender of premium was not made within the grace period. We are disposed to hold that the evidence was prima facie sufficient to establish as a fact that the tender of payment of the premium was not made until after the expiration of the period of

grace, which was August 20, 1933. The postoffice stamp which appears on the envelope returned by the assured with others facts above recited seem to compel this conclusion.

There remains for consideration the second issue of fact, namely, as to whether defendant by its conduct in accepting payment of prior premiums after the expiration of the period of grace and by requesting payment of premiums which accrued thereafter waived the delay in tendering payment of this premium and is estopped as against plaintiff to urge that the policy had lapsed at the date of the death of the assured. The law of this state does not favor the lapse of insurance policies. The provisions of the policy for forfeiture for non-payment of premiums were inserted in the insurance contract which was prepared by defendant company and was for its own benefit and not for the benefit of the insured. The company, therefore, could waive these provisions and any ambiguous provisions in the contract must be construed liberally in favor of the insured. As was stated in Baxter v. Metropolitan Life Ins. Co., 318 Ill., 369, 372:

"If the conduct of the insurer is such as to induce the assured to believe that a forfeiture will not be insisted upon, the insurer will be held to be estopped from taking advantage of such forfeiture. Bennett v. Union Central Life Ins. Co., 203 Ill. 439; Aetna Life Ins. Co. v. Sanford, 200 id. 126; Illinois Life Ass'n v. Wells, 200 id. 445; Manufacturers and Merchants Ins. Co. v. Armstrong, 145 id. 469; Chicago Life Ins. Co. v. Warner, 80 id. 410."

The evidence here shows that the payment of all these premiums was made by the insured to defendant through checks. The receipt of a check is not payment. The premium was not paid until the check tendered in payment was honored by the bank on which it was drawn. Since the enactment of the Negotiable Instrument Act in this state (see Ill. State Bar Stats., chap. 98, sec. 188, par. 210) a check no longer operates as an assignment of any part of the fund on which it is drawn. A check is therefore not payment in the absence of an express agreement of the parties to that effect.

grace, which was August 28, 1928. The possessing stamp which appears on the envelope returned by the insurer with checks dated above recited case is proof of only one mailing.

There remains for consideration the second issue of fact, namely, as to whether delivery by its contract in accepting payment of prior premiums after the expiration of the period of grace and by requesting payment of premiums which accrued in further waived the delay in tendering payment of this premium and is estopped as against plaintiff to urge that the policy had lapsed at the date of the death of the insured. The law of this state does not favor the lapse of insurance policies. The provisions of the policy for forfeiture for non-payment of premiums were inserted in the insurance contract which was prepared by defendant company and was for its own benefit and not for the benefit of the insured. The company, therefore, could waive those provisions and by waiving provisions in the contract must be construed liberally in favor of the insured. As was stated in Barker v. Metropolitan Life Ins. Co., 328 Ill., 329, 332:

> "If the conduct of the insurer is such as to induce the assured to believe that a forfeiture will not be insisted upon, the insurer will be held to be estopped from taking advantage of such forfeiture. Bennett v. Union Central Life Ins. Co., 303 Ill. 439; Aetna Life Ins. Co. v. Conway, 200 Ill. 164; Fidelity Life Assn. v. Wells, 210 Ill. 485; Schmidt-Ferre and Berry Ins. Co. v. Ferstrom, 140 Ill. 164; Reliance Life Ins. Co. v. Turner, 00 Ill. 410."

The evidence here shows that the payment of all these premiums was made by the insured to defendant through checks. The receipt of a check is not payment. The premium was not paid until the check tendered in payment was honored by the bank on which it was drawn. Since the enactment of the negotiable instruments act in this state (see Ill. Stats. Ann. Chap. 98, sec. 128, par. 210) a check no longer operates as an assignment of any part of the fund on which it is drawn. A check is therefore not payment in the absence of an express agreement of the parties to that effect.

This is well settled by a long line of cases cited in plaintiff's brief, from Strong v. King, 35 Ill., 9, to Baxter v. Metropolitan Life Ins. Co., 318 Ill. 369.

Here it appears from the facts stipulated that the prior premium due on this policy on January 20, 1932, was paid in advance; that the premium due April 20, 1932, was paid May 21, 1932, one day after the expiration of the last day of grace; that the premium due July 20 of the same year was paid August 25, 5 days after the expiration of the last day of grace; and the premium due October 20 on November 23, 3 days after the expiration of grace. The premium due January 20, 1933, was paid February 21 of the same year, 1 day after the expiration of grace, and that of April 20, 1933, on May 23, 1933, 3 days after the expiration of the grace period.

Defendant argues, however, that it has a right to assume (there being no proof to the contrary) that these checks were mailed, and (there being no information as to the place from which the same were mailed) it is clear that all of them must have been deposited in the mail before the last day of grace. Therefore, defendant says, the facts stipulated fail to show acceptance by defendant of the former premiums tendered after the expiration of grace. We hold that these facts may not be assumed in the absence of proof.

Defendant further says that giving plaintiff the benefit of every doubt it conclusively appears that prior to July 20, 1933, the defendant company did not accept any premium from the assured more than 4 days after the expiration of grace. It is argued, therefore, as a matter of law, that such acceptance would not amount to waiver by defendant of its right to refuse a premium not received by it until 8 days after grace had expired. In other words, defendant says it did not in any view of the matter commit

This is well settled by a long line of cases cited in plaintiff's brief, from Stroud v. Ins., 32 Ill., 9, to Bunker v. Metropolitan Life Ins. Co., 312 Ill. 322.

Here it appears from the facts stipulated that the prior premium due on this policy on January 30, 1932, was paid in advance; that the premium due April 30, 1932, was paid May 21, 1932, one day after the expiration of the last day of grace; that the premium due July 30 of the same year was paid August 25, 5 days after the expiration of the last day of grace; and the premium due October 20 on November 23, 3 days after the expiration of grace. The premium due January 20, 1933, was paid February 21 of the same year, 1 day after the expiration of grace, and that of April 20, 1933, on May 23, 1933, 3 days after the expiration of the grace period.

Defendant argues, however, that it has a right to assume (there being no proof to the contrary) that these checks were mailed, and (there being no information as to the place from which the same were mailed) it is clear that all of them must have been deposited in the mail before the last day of grace. Therefore, defendant says, the facts stipulated fail to show acceptance by defendant of the former premiums tendered after the expiration of grace. We hold that these facts may not be assumed in the absence of proof.

Defendant further says that giving plaintiff the benefit of every doubt it consistently appears that prior to July 20, 1932, the defendant company did not accept any premium from the assured more than 4 days after the expiration of grace. It is argued, therefore, as a matter of law, that such acceptance would not amount to waiver by defendant of its right to refuse a premium not received by it until 4 days after grace had expired. In other words, defendant says it did not in any view of the matter commit

itself to an unlimited waiver so that its policyholders might tender premiums any number of days later with impunity. There is, says defendant, no equitable reason why a limited amount of leniency at one time should warrant an unlimited amount of leniency at future times. Defendant cites Daley v. Metropolitan Life Ins. Co., 81 N. H. 502, 128 Atl. 531, and Perlman v. New York Life Ins. Co., 254 N. Y. Supp. 646, 234 App. Div. 349.

The court was requested to so hold as a proposition of law but refused. We hold the ruling of the court was proper. The cases cited are distinguishable on the facts in that the claimed waiver here arises solely from the conduct of the parties while in the cases cited the waiver was based on express notices. As plaintiff points out, in case of any abuse of a waiver by a policyholder the abuse could be terminated through notice by the insurance company in apt time to the assured.

Whatever may be the rule in other states, we hold that defendant by its conduct waived the payment of premiums within the strict provisions of the policy and is now estopped as against plaintiff to claim a forfeiture of the policy for non-payment. That the waiver of the default was not intentional would make no difference. It appears here that not only was the prompt payment of prior premiums waived, but that defendant company by an express notice requested the payment of another premium which would mature at a later date. It would be unjust to permit defendant not only to receive and keep the premium but send out notices requesting further payments of premiums and then deny liability on the ground that the policy had lapsed. The cases in this state applicable have been reviewed in Routa v. Royal League, 274 Ill. App. 152, and it is unnecessary to repeat what it said there. Only a few of the many Illinois cases which might be cited to the effect that on the uncontradicted facts the forfeiture of this policy had been waived,

itself to an unlimited waiver so that its policyholders might tender premiums any number of days later with impunity. There is, says defendant, no equitable reason why a limited amount of leniency at one time should warrant an unlimited amount of leniency at future times. Defendant cites Duley v. Metropolitan Life Ins. Co., 81 A. R. 308, 128 Atl. 531, and Perlman v. New York Life Ins. Co., 254 N. Y. Supp. 646, 234 App. Div. 342.

The court was requested to so hold as a proposition of law but refused. We hold the ruling of the court was proper. The cases cited are distinguishable on the facts in that the claimed waiver here arises solely from the conduct of the parties while in the cases cited the waiver was based on express notices. As plaintiff points out, in case of any abuse of a waiver by a policyholder the abuse could be terminated through notice by the insurance company in apt time to the assured.

Whatever may be the rule in other states, we hold that defendant by its conduct waived the payment of premiums within the strict provisions of the policy and is now estopped as against plaintiff to claim a forfeiture of the policy for non-payment. That the waiver of the default was not intentional would make no difference. It appears here that not only was the prompt payment of prior premiums waived, but that defendant company by an express notice requested the payment of another premium which would mature at a later date. It would be unjust to permit defendant not only to receive and keep the premium but send out notices requesting further payments of premiums and then deny liability on the ground that the policy had lapsed. The cases in this state applicable have been reviewed in Hunts v. Royal League, 274 Ill. App. 132, and it is unnecessary to repeat what it said there. Only a few of the many Illinois cases which might be cited to the effect that on the uncontradicted facts the forfeiture of this policy had been waived,

and that the defendant is estopped to set up the defense claimed, are Baxter v. Metropolitan Life Ins. Co., 318 Ill. 369; Adam v. Columbia Nat'l Life Ins. Co., 218 Ill. App. 54, and Waerness v. Independent Order of Foresters, 244 Ill. App. 211.

The judgment is affirmed.

AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

and that the defendant is estopped to set up the defense claimed, are Baxter v. Metropolitan Life Ins. Co., 248 Ill. 369; Aden v. Columbia Nat'l Life Ins. Co., 248 Ill. App. 54, and Wallace v. Independent Order of Foresters, 244 Ill. App. 222.

The judgment is affirmed.

AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

40230

GEORGE L. FREDERICKS,
Appellee,

vs.

ALBERT R. URBACH et al.,
Co-Parties Defendant,
and
ROBERT ANDERSON, DAISY ANDERSON,
HERBERT ANDERSON, ELLA ANDERSON,
MARSHALL ANDERSON and RUTH ANDERSON,
Appellants.

APPEAL FROM CIRCUIT
COURT OF COOK COUNTY.

52A

296 I.A. 647[3]

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by certain defendants from a decree of foreclosure entered in the Circuit court of Cook county on March 2, 1938, in favor of the plaintiff, George L. Fredericks. The bill of 12 paragraphs was filed April 23, 1937. It was based on a trust deed executed December 16, 1921, by Albert R. Urbach, a bachelor, conveying certain improved premises in Chicago, Cook county, Illinois, to secure his note for $7500 of the same date, due five years after date, with interest. The note and coupons representing the interest were payable at the office of defendant, A. F. Hallmann. The conveyance was to the Chicago Title & Trust Company as Trustee.

At the maturity of the note on December 16, 1926, $2500 was paid on the principal and interest which had theretofore accrued was also paid. November 27 prior to that date Nels A. Anderson and Mary, his wife, who in the meantime had become the owners of the premises, entered into a written agreement with Herman F. Hallmann, whereby the time of payment of the balance due (amounting to $5000) was extended to December 16, 1931, with interest at 6% per annum. Again on March 12, 1931, by like agreement between Nels and Mary Anderson and August F. Hallmann, the time of payment of the principal was again extended to December 16, 1936, with interest at 6% per annum. At the end of the time

GEORGE L. WHEDRICKS,
Appellee,

vs.

ALBERT R. URBAN et al.,
Co-Partners Defendant,
and
ROBERT ADDERSON, DAVID ANDERSON,
HERBERT ANDERSON, ELLA ANDERSON,
MARSHALL ANDERSON and RUTH ANDERSON,
Appellants.

APPEAL FROM CIRCUIT
COURT OF COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by certain defendants from a decree of foreclosure entered in the circuit court of Cook county on March 2, 1938, in favor of the plaintiff, George L. Fredericks. The bill of 12 paragraphs was filed April 23, 1937. It was based on a trust deed executed December 16, 1921, by Albert R. Urban, a bachelor, conveying certain improved premises in Chicago, Cook county, Illinois, to secure his note for $7500 of the same date, due five years after date, with interest. The note and coupons representing the interest were payable at the office of defendant, A. F. Hallmann. The conveyance was to the Chicago Title & Trust Company as Trustee.

At the maturity of the note on December 16, 1926, $2500 was paid on the principal and interest which had theretofore accrued was also paid. November 27 prior to that date Nels A. Anderson and Mary, his wife, who in the meantime had become the owners of the premises, entered into a written agreement with Herman A. Hallmann, wherein the time of payment of the balance due (amounting to $5000) was extended to December 16, 1931, with interest at 6% per annum. Again on March 12, 1931, by like agreement between Nels and Mary Anderson and August A. Hallmann, the time of payment of the principal was again extended to December 16, 1936, with interest at 6% per annum. At the end of the time

as extended the principal of the note was not paid as agreed, and for this default plaintiff owner brought his bill to foreclose. All interest up to maturity, however, has been paid.

The premises in question are 30 by 125 feet and known as 2717 Leland avenue, Chicago, and are improved by a two-apartment brick building and a two-car garage. The bill filed by plaintiff is verified and avers that the value of the premises is $8000.

Nels A. Anderson, holding the legal/tital to these premises on August 15, 1936, died testate, leaving his sons, Robert, Herbert, Marshall and Arthur, and his daughter Ella J., his only heirs at law and next of kin. Mary Anderson, his wife, predeceased him. The will named his son Marshall executor and devised all his right, title and interest in the premises to the sons Robert, Herbert and Marshall. This will was admitted to probate in the Probate court of Cook County April 26, 1937, three days after the filing of the bill herein.

The only defense alleged in the answer is to the effect that after the death of Nels Anderson his children, the defendants, negotiated with plaintiff through plaintiff's agent, August F. Hallmann, for an extension of the time of payment of the loan; that plaintiff agreed to accept a new mortgage on the same premises for the principal amount of $5000, due five years after date, with interest at 6% per annum, payable semi-annually; that the defendants executed and delivered such a promissory note, dated December 16, 1936, and executed a trust deed on that date conveying the premises to August F. Hallmann, as trustee, to secure the payment of this note; that the trust deed was duly filed for record on January 19, 1937, and that by reason of the premises the indebtedness secured by the first trust deed had been paid.

The cause was referred to a master who took the evidence and reported that plaintiff, through August F. Hallmann as his agent,

as extended the principal of the note was not paid as agreed, and for this default plaintiff owner brought his bill to foreclose. All interest up to maturity, however, has been paid.

The premises in question are 30 by 120 feet and known as 2717 Leland avenue, Chicago, and are improved by a two-apartment brick building, and a two-car garage. The bill filed by plaintiff is verified and avers that the value of the premises is $8,000.

Nels A. Anderson, holding the legal title to these premises on August 15, 1936, died testate, leaving his sons, Robert, Herbert, Marshall and Arthur, and his daughter Ella J., his only heirs at law and next of kin. Mary Anderson, his wife, predeceased him. The will named his son Marshall executor and devised all his right, title and interest in the premises to the sons Robert, Herbert and Marshall. This will was admitted to probate in the Probate court of Cook County April 20, 1937, three days after the filing of the bill herein.

The only defense alleged in the answer is to the effect that after the death of Nels Anderson his children, the defendants, negotiated with plaintiff through plaintiff's agent, August K. Hallmann, for an extension of the time of payment of the loan; that plaintiff agreed to accept a new mortgage on the same premises for the principal amount of $5000, due five years after date, with interest at 6% per annum, payable semi-annually; that the defendants executed and delivered such a preliminary note, dated December 15, 1936, and executed a trust deed on that date conveying the premises to August K. Hallmann, as trustee, to secure the payment of this note; that the trust deed was duly filed for record on January 19, 1937, and that by reason of the premises the indebtedness secured by the first trust deed had been paid.

The cause was referred to a master who took the evidence and reported that plaintiff, through August K. Hallmann as his agent,

had agreed to extend the loan through the execution of a new trust deed; that the new note, coupons representing the interest and the trust deed had been delivered to Hallmann for plaintiff; that the bill, based upon the old trust deed, was therefore without equity and should be dismissed. Objections of plaintiff filed before the master were overruled and stood as exceptions upon the hearing before the chancellor, who sustained the same and entered a decree of foreclosure as prayed in the bill. From that decree defendants have perfected this appeal.

The parties seem to agree that the ultimate question in this case is of fact.

In considering the evidence the weight to be given to the findings of the master becomes important. Where his findings have been approved by the chancellor the more recent holding is that these findings are entitled to the same weight as the verdict of the jury. Pasadach v. Auw, 364 Ill., 491. Here, however, the finding of the master was not approved by the chancellor and the rule stated is not applicable. We are therefore not bound by the rule applicable where the decree approves the master's report that the finding of the chancellor will not be overruled unless his findings are clearly and manifestly against the weight of the evidence. Stasch v. Stasch, 355 Ill. 581. In a case like this the rule seems to be that the findings of the master, while only advisory, are entitled to much consideration. Kasakowski v. Bagdon, 369 Ill. 252. We have given due consideration to the master's findings in weighing the evidence in the record.

The principal witnesses giving direct testimony on this point in favor of defendants' theory were August F. Hallmann and Charlotte Peterson, who was the clerk and stenographer in his office, and the defendants the Andersons. The uncontradicted evi-

had agreed to extend the loan through the execution of a new trust deed; that the new note, covering certain the interest and the trust deed had been delivered to Williams for clearing; that the bill, based upon the old trust deed, was therefore without equity and should be dismissed. Objections of plaintiff came before the master were overruled and after he testifying upon the hearing before the chancellor, who sustained the same and entered a decree of foreclosure as prayed in the bill. From that decree del Monte have perfected this appeal.

The parties seem to agree that the ultimate question in this case is of fact.

In considering the evidence the weight to be given to the findings of the master becomes important. Where his findings have been approved by the chancellor the more recent holding is that these findings are entitled in the same weight as the verdict of the jury. Pendleton v. Ray, 101 Ill., 491. But, however, the finding of the master was not approved by the chancellor and the rule stated is not applicable. We are therefore not bound by the rule applicable where the decree approves the master's report that the finding of the chancellor will not be overturned unless his findings are clearly and manifestly against the weight of the evidence. Steson v. Steson, 190 Ill. 502. In a case like this the rule seems to be that the findings of the master, while only advisory, are entitled to such consideration. Greenwald v. Gordon, 249 Ill. 523. We have given the consideration to the master's findings in weighing the evidence in the record.

The principal witnesses giving direct testimony on this point in favor of defendants' theory were Angelo A. Williams and Charlotte Peterson, who was the clerk and stenographer in his office, and the defendants themselves. The uncontradicted testi-

dence shows that August F. Hallmann had been for many years a dealer in real estate and real estate loans. His office was at 5443 Lincoln avenue. At one time his nephew, Herman Hallmann, was connected with the business. The premises in question seem to have been conveyed by August Hallmann to Urbach, who gave the original mortgage in 1921. Fredericks, the plaintiff, knew both the Hallmanns and had frequently purchased securities of this kind from them. He did not make the original loan and he did not own the mortgage at any time when the principal amount of it was $7500. His best recollection is that he purchased the mortgage in 1929; the purchase was made from August Hallmann; the notes were payable at Hallmann's office. Plaintiff has had the notes in his possession ever since he acquired the mortgage; the interest has been sometimes paid to him directly, sometimes indirectly through the Hallmanns; the interest due on December 16, 1936, was paid to plaintiff by A. F. Hallmann.

Plaintiff's testimony is to the effect that he first learned of the wish of the Anderson heirs to renew the loan some two or three months after the payment of this interest when, as he says, he asked A. F. Hallmann for the insurance papers and was told by Hallmann that he could not give them to him because he had taken a new mortgage; this was about March 7, 1937, when, as plaintiff says, Hallmann showed him a letter of opinion on the title by the Chicago Title & Trust Company. Plaintiff says he then told Hallmann that he wanted his money; he says if the title had been clear he does not know whether he would have taken the new mortgage, as he needed the money. Hallmann says he told him that he had heard the objections to the title had all been cleared up. Plaintiff told Hallmann he would think it over, but he would not take the mortgage unless there was absolutely clear title. Thereafter they often talked about the matter; he had appointments at least two or three times a week for a month or two; then plaintiff saw his

dence more than lawyer F. Hallinan had been for many years a leader in real estate and real estate loans. His office was at 6432 Lincoln avenue. It was also his residence, between Hallinan, who connected with the business. The premises in question seem to have been conveyed by August Hallinan to Frederick, who gave the original mortgage in 1921. Frederick, the plaintiff, knew with the Hallinans and frequently processed mortgages of this kind from them. He did not make the original loan and did not own the mortgage at any time when the principal amount was in the [illegible]. His best recollection is that he purchased the mortgage in 1925; the purchase was made from August Hallinan; the notes were payable at Hallinan's office. Plaintiff had kept the notes in his possession ever since he acquired the mortgage; the interest was kept current and he was directly, sometimes indirectly through the Hallinans; the interest due on December 15, 1926, was paid to plaintiff by F. V. Hallinan.

Plaintiff's testimony is to the effect that he first learned of the sale of the mortgage while he found the loan some two or three months after the payment of this interest was, he says, he asked F. V. Hallinan for the insurance papers and was told by Hallinan that he could not live them to the because he had taken a new mortgage; this was about March 7, 1927, when, as plaintiff says, Hallinan showed him a letter of [illegible] on the title by the Chicago Title & Trust Company. Plaintiff says he then said Hallinan that he wanted his money; he says it was [illegible] that he does not know whether he would have taken the new mortgage, he regarded the money. Hallinan says he told him that he had heard the objections to the title but all been cleared up. Plaintiff told Hallinan he really didn't care, but he would not take the mortgage unless there was something clear title. Thereafter they often talked about the matter; he saw Hallinan at least two or three times a week for a month or two; then plaintiff saw him

lawyer, and April 10, 1937, the attorney wrote to Mr. Williams, the attorney for the Anderson heirs, that his client was insisting on payment of the mortgage and had instructed him to start foreclosure proceedings. The letter asked that the attorney to whom it was directed inform his clients so that they might save themselves from the expenses incident to foreclosure.

On the contrary Miss Peterson testifies that as early as October or November, 1936, plaintiff came to the office and asked her about the Anderson mortgage; she says she told him she had notified the Andersons that it was about to become due but they had not come in as yet; she says plaintiff then said if they could not pay he would extend the mortgage for a reasonable time. Miss Peterson also testified that about December 16, 1936, when the final payment of interest on the old mortgage was made, plaintiff was present and that in a conversation between him and Mr. Hallmann she heard Hallmann say to plaintiff that the Andersons were not able to pay the mortgage, to which plaintiff replied he was willing to extend it; she further says that they discussed at that time the question of whether the title should be brought down and new papers made out, and that plaintiff said he would like to have new papers, to which Hallmann replied he thought this was best; that Mr. Hallmann said if the title was shown not to be as it should, they would simply extend the mortgage. She testified she thereafter filled out the new mortgage and sent it to Mr. Williams, attorney for the Anderson heirs. The trust deed was returned and recorded. She says plaintiff was informed of these things by Mr. Hallmann, and that plaintiff said he would wait until the objections were cleaned up.

August F. Hallmann gave testimony in the main tending to corroborate that of Miss Peterson, while in some respects the matters he narrated were inconsistent with her testimony. Hallmann was made a defendant to the original bill which alleged he was the

lawyer, and April 1c, 1937, the attorney wrote to Mr. Williams, the attorney for the Anderson heirs, that his client was insisting on payment of the mortgage and had instructed him to start foreclosure proceedings. The letter added that the attorney to whom it was directed inform his clients so that they might save themselves from the expense incident to foreclosure.

On the contrary, Miss Peterson testifies that as early as October or November, 1936, plaintiff came to the office and asked her about the Anderson mortgage; she says she told him she had notified the Andersons that it was about to become due but they had not come in as yet; and says plaintiff then said it they could not pay he would extend the mortgage for a reasonable time. Miss Peterson also testified that about December 1c, 1936, when the final payment of interest on the old mortgage was made, plaintiff was present and that in a conversation between him and Mr. Hallmann the heard Hallmann say to plaintiff that the Andersons were not able to pay the mortgage, to which plaintiff replied he was willing to extend it; she further says that they discussed at that time the question of whether the title should be brought down and new papers made out, and that plaintiff said he would like to have new papers, to which Hallmann replied he thought this was best; that Mr. Hallmann said if the title was shown not to be as it should, they would slowly extend the mortgage. The testimony thereafter filled out the new mortgage and sent it to Mr. Williams, attorney for the Anderson heirs. The first deed was returned and recorded. She says plaintiff was informed of these things by Mr. Hallmann, and that plaintiff said he would wait until the objections were cleared up.

August 1. Hallmann gave testimony in the main tending to corroborate that of Miss Peterson, while in some respects the matters he narrated were inconsistent with her testimony. Hallmann was made a defendant to the original bill which alleged he was the

trustee named in the new trust deed and the owner of it and the notes it was given to secure. Hallmann did not enter an appearance nor file any answer. He was defaulted and the bill taken as confessed against him. He was at first called as a witness for plaintiff and then said (but later denied) that he was the owner and holder of the new securities. As already stated, while in general his testimony corroborates that of Miss Peterson, his narration of his negotiations with the parties is not consistent with her testimony that plaintiff as early as October or November told her that if the Andersons could not pay he would renew the mortgage for a reasonable time. Other material parts of her testimony were disclosed by cross-examination to be improbable and the material parts of it, as well as that of Hallmann, are vigorously denied in general and particular by plaintiff. This first conversation, if true, was most important, but Miss Peterson does not say that she ever communicated it to Hallmann, nor does Hallmann say that she did.

Notwithstanding the fact that the master, who saw and heard the witnesses, found in favor of defendants' contention on the issues of fact, the chancellor concluded that a decree of foreclosure should be entered in favor of plaintiff, and after a careful consideration of the record we have come to the conclusion that the decree must be affirmed.

In the first place, it is apparent that the burden of proof was upon defendants to establish the affirmative defense which was set up by them in their answer. From a careful consideration of all the facts and circumstances we are disposed to hold that the chancellor was justified in finding that the defense set up had not been sustained. Contrary to the findings of the master, we think it apparent that Hallmann in this transaction was acting in behalf of the Andersons and of himself in his efforts to secure an extension of the loan. He disclaims any charge against plaintiff for his

transfer made in the new trust deed and the owner of it, the lie notes it was given to secure. Anderson did not enter an appearance nor file any answer. He was defaulted and the suit taken as confessed against him. He was at first called as a witness for plaintiff and then said (but later denied) that he was the owner and holder of the new securities. He already stated, while in general his testimony corroborates that of his brother, his narration of his negotiations with the parties is not consistent with her testimony that plaintiff as early as October or November told her that if the Anderssons could not pay he would take the mortgage for a reasonable time. Other material parts of her testimony were disclosed by cross-examination to be improbable and the material parts of it, as well as that of Hallinan, are vigorously denied in general and particularly by plaintiff. This first conversation, if true, was most important, but Miss Anderson does not say that she ever communicated it to Hallinan, nor does Hallinan say that she did.

Notwithstanding the fact that the master, who saw and heard the witnesses, found in favor of defendants' contention on the issues of fact, the chancellor concluded that a decree of foreclosure should be entered in favor of plaintiff, and after a careful consideration of the record we have come to the conclusion that the decree must be affirmed.

In the first place, it is apparent that the burden of proof was upon defendants to establish the affirmative defense which was set up by them in their answer. From a careful consideration of all the facts and circumstances we are disposed to hold that the chancellor was justified in finding that the defense set up had not been sustained. Contrary to the findings of the master, we think it appears that Hallinan in this transaction was acting in behalf of the Anderssons and of himself in his efforts to secure an extension of the loan. He disclaims any charge against plaintiff for his

services or liability on plaintiff's part for the extensive search into the title, which he procured from the Chicago Title & Trust company. It is fair to assume that Hallmann was not in business for his health alone; that the cost of this search of title would have been charged up by him to the Andersons, and that he would, upon successful completion of the matter, have made a reasonable charge to the Andersons for his commission; his interests were, therefore, with the Andersons, not with the plaintiff, and his duties to the Anderson heirs were inconsistent with obligations which would have rested upon him as the agent of the plaintiff. The opinion of the Chicago Title & Trust Company showed, and plaintiff upon the hearing proved, numerous substantial defects in the title of the Anderson heirs. Some of them had judgments against them and, as a matter of fact, even at the time this bill was filed, the will of Nels Anderson had not been proved in the Probate court. His interest in this estate would have been subject to such debts as might have been proved against him within the statutory period. It was unreasonable to expect that any investor would accept such a title as security for the notes of parties, none of whom were shown to be people of substance and some of whom had filed petitions in bankruptcy.

In fact, Hallmann testified that some time after the 6th or 7th of February, 1937, in a conversation at his office with the plaintiff, witness said to him, "If the old mortgage is good, you have nothing to worry about; we wont make an exchange on this mortgage until the title is in such shape that we can release it and get a new mortgage policy; I will renew that." It is not claimed that any such title was tendered or mortgage policy offered.

Possibly, as defendants suggest, a court of equity would under all the circumstances at the suit of plaintiff and upon his acceptance of the mortgage, hold this new mortgage to be in law

services or liability on plaintiff's part for the extensive search into the title, which he procured from the Union, Title & Trust company. It is fair to assume that Williamson was not in business for his health alone; the cost of this search of title would have been charged up by him to the mortgagee, and that he would, upon successful completion of the matter, have made a reasonable charge to the Anderson for his commission; his interests were, therefore, with the mortgagee, not with the plaintiff, and his duties to the Anderson heirs were inconsistent with obligations which would have rested upon him as the agent of the plaintiff.

The opinion of the Union Title & Trust company showed, the plaintiff upon the hearing proved, numerous substantial defects in the title of the Anderson heirs. Some of them had judgments against them and, as a matter of fact, even at the time this will was filed, the will of Asia Anderson had not been proved in the probate court. His interest in this estate would have been subject to such debts as might have been proved against him within the statutory period. It was unnecessary to expect that any investor would accept such a title as security for the notes of parties, some of whom were known to be people of substance and some of whom had filed petitions in bankruptcy.

In fact, Williamson testified that some time after the 6th or 7th of February, 1907, in a conversation at his office with the plaintiff, witness said to him, "If the old mortgage is good, you have nothing to worry about; we could make an exchange on this mortgage until the title is in such shape that we can release it and get a new mortgage policy; I will renew them." It is not claimed that any such title was tendered or mortgage policy offered.

Possibly, on a defensive judgment, a court of equity would under all the circumstances at the suit of plaintiff and upon his acceptance of the mortgage, hold this new mortgage to be in law

merely an extension of the old, in conformity with Lowman v. Lowman, 118 Ill. 582; First Trust, etc. Bank v. Hickok, 288 Ill. App. 131, and other cases cited by defendants. But it would be unreasonable to expect plaintiff to assume the risks of litigation on account of the many respects in which the evidence shows the title tendered was defective. Moreover, this defense (now insisted on) is not the defense set up in defendants' answer.

The decree is affirmed.

AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

merely an extension of the act, in contemplation of Dobson v. Dobson, 118 III. 382; Ilsley Trust, 40 L. Bank v. Glasser, 344 III. App. 1 M, and other cases cited by defendants. But it would be unreasonable to expect plaintiff to assume the risks of litigation on account of the many respects in which the evidence shows Mr. Hills testator was defective. Moreover, this defense (now insisted on) is not the defense set up in defendants' answer.

The decree is affirmed.

AFFIRMED.

Mccurely, P. J., and O'Connor, J., concur.

40113

DONNA MARIE HANSEN, a Minor,
by LOUISE HANSEN, her Mother
and Next Friend,
Appellee,

vs.

HAZEL SPAHR,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

296 I.A. 647

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against defendant to recover damages for personal injuries sustained by her through the claimed negligence of defendant in driving her automobile, resulting ina collision which injured plaintiff. There was a verdict and judgment in plaintiff's favor for $2750 and defendant appeals.

The record discloses that a few minutes before 9 o'clock the morning of November 19, 1936, plaintiff, six years of age, was crossing from the east to the west side of 17th avenue, a north and south street in Maywood, when she was struck and injured by defendant's north bound automobile. The accident occurred in front of the Irving school, located on the east side of the avenue.

Plaintiff's theory is that she was exercising the care required of one her age, and that defendant drove her automobile negligently. On the other side, defendant contends she was guilty of no negligence, but that the accident occurred because plaintiff, without warning, ran into the side of her automobile.

The evidence is to the effect that the Irving school occupies the entire block on the east side of 17th avenue between Warren avenue and School street - a short block; that the entrance of the school is about the middle of the block, and a sidewalk extends from the building to the curb; the roadway of the street, about 22 to 24 feet wide, is paved with brick; that the morning

DORRA MARIE HANSEN, a minor,
by LOUISE HANSEN, her mother
and next friend,
Appellee,

vs.

HAZEL SPAEN,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

29 I.A. 647

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against defendant to recover damages for personal injuries sustained by her through the claimed negligence of defendant in driving her automobile, resulting in a collision which injured plaintiff. There was a verdict and judgment in plaintiff's favor for $2750 and defendant appeals.

The record discloses that a few minutes before 9 o'clock the morning of November 12, 1936, plaintiff, six years of age, was crossing from the east to the west side of 17th avenue, a north and south street in Maywood, when she was struck and injured by defendant's north bound automobile. The accident occurred in front of the Irving school, located on the east side of the avenue.

Plaintiff's theory is that she was exercising the care required of one her age, and that defendant drove her automobile negligently. On the other side, defendant contends she was guilty of no negligence, but that the accident occurred because plaintiff, without warning, ran into the side of her automobile.

The evidence is to the effect that the Irving school occupies the entire block on the east side of 17th avenue between Warren avenue and school street - a short block; that the entrance of the school is about the middle of the block, and a sidewalk extends from the building to the curb; the roadway of the street, about 22 to 24 feet wide, is paved with brick; that the morning

was clear and the pavement dry; that a number of children were coming to the school at the time; plaintiff's father had driven from his home with plaintiff in his automobile; he stopped at the west curb of 17th avenue a short distance south of the entrance to the school; plaintiff got out of the automobile, crossed over to the school entrance to speak to a school companion about her dress, and as she was returning to tell her father what she had found out she was struck by the front right-hand fender or the right side of defendant's automobile, in which defendant was bringing her child to the same school; she intended to drive to the north entrance of the school building. Plaintiff was caught on the handle of the right-hand door and severely injured. Cars were parked on each side of the roadway but none directly in front of the entrance to the school building.

There is further evidence to the effect that the children in coming to and going from the school crossed the street in front of the entrance on 17th avenue.

Three occurrence witnesses testified - plaintiff's father and Mrs. James D. Dowdakin for plaintiff, and defendant testifying in her own behalf. Mrs. Dowdakin testified in substance that she had driven her child to school the morning in question and had stopped at the east curb a short distance south of the entrance on 17th avenue; that at that time a number of children were arriving at the school; that her car was the third parked car south of the entrance; that through the mirror in her car she saw defendant's car approaching from the south, and that in her opinion defendant was driving more than 30 miles an hour; that the right-hand fender of defendant's car struck plaintiff and swung her around.

Plaintiff's father testified that he drove his child to the school and stopped at the west curb; the school was in the residential district in Maywood; the sidewalk leading from the

was clear and the pavement dry; that a number of children were coming to the school at the time; plaintiff's father had driven from his home with plaintiff in his automobile; he stopped at the west curb of 17th avenue a short distance south of the entrance to the school; plaintiff got out of the automobile, crossed over to the school entrance to speak to a school companion about her dress, and as she was returning to tell her father what she had found out she was struck by the front right-hand fender or the right side of defendant's automobile, in which defendant was bringing her child to the same school; she intended to drive to the north entrance of the school building. Plaintiff was caught on the handle of the right-hand door and severely injured. Cars were parked on each side of the roadway but none directly in front of the entrance to the school building.

There is further evidence to the effect that the children in coming to and going from the school crossed the street in front of the entrance on 17th avenue.

Three occurrence witnesses testified - plaintiff's father and Mrs. James D. Dowdskin for plaintiff, and defendant testifying in her own behalf. Mrs. Dowdskin testified in substance that she had driven her child to school the morning in question and had stopped at the west curb a short distance south of the entrance on 17th avenue; that at that time a number of children were arriving at the school; that her car was the third parked car south of the entrance; that through the mirror in her car she saw defendant's car approaching from the south, and that in her opinion defendant was driving more than 30 miles an hour; that the right-hand fender of defendant's car struck plaintiff and swung her around.

Plaintiff's father testified that he drove his child to the school and stopped at the west curb; the school was in the residential district in Maywood; the sidewalk leading from the

building to the east curb was 25 feet wide; that there were "Slow" and "Caution" signs placed in the vicinity; that defendant's car as it passed the place where his car was standing was going faster than 35 miles an hour.

Mrs. Spahr, the defendant, testified that she had driven a car about 14 years and on the morning in question was taking her child and a neighbor's to the kindergarten held in the Irving school building about 4 blocks from where she lived; that she entered 17th avenue about 3 blocks from the school, traveling at 20 to 25 miles an hour and reduced the speed to 10 to 15 miles an hour when she got near School street, an east and west street bordering the school on the south; that she usually let her child out at the corner of School street and 17th avenue, but as there was no parking space there she drove to the other corner toward Warren avenue, the street on the north of the school building; that "all of a sudden I heard someone scream and just as soon as I heard her scream I put the brakes on and stopped" in a short distance; that "The first I saw the child [plaintiff] was on the right door of my car. I did not see her at any time before the accident in front of my car."

Defendant contends that the court should have granted her motion for a directed verdict made at the close of plaintiff's evidence. There is no merit in this contention. That motion was out of the case for all time after defendant put in her evidence. The question whether the court should have sustained defendant's motion made at the close of all the evidence, is properly before us and must be determined by a consideration of all the evidence. Cook v. Avermann, Appellate Court, First Dist., #31276; J. A. & N. Ry. Co. v. Velie, 140 Ill. 59; Fowler v. C. & W. I. R. Co., 182 Ill. App. 123.

Plaintiff, being under 7 years of age at the time of the

building to the east curb was 20 feet wide; that there were "slow" and "Caution" signs placed in the vicinity; that defendant's car as it passed the place where his car was standing was going faster than 35 miles an hour.

Mrs. Spear, the defendant, testified that she had driven a car about 14 years and on the morning in question was taking her child and a neighbor's to the kindergarten held in the Irving school building about 4 blocks from where she lived; that she entered 17th avenue about 3 blocks from the school, traveling at 20 to 25 miles an hour and reduced the speed to 10 to 15 miles an hour when she got near school street, on each side of which stood a school building; that she usually let her child out at the corner of School street and 17th avenue, but as there was no parking space there she drove to the other side of the street toward Warren avenue, the street on the north of the school building; that "all of a sudden I heard someone scream and just as soon as I heard her scream I put the brakes on and stopped" in a short distance; that "the first I saw the child (Plaintiff) was on the right door of my car. I did not see her at any time before the accident in front of my car."

Defendant contends that the court should have granted her motion for a directed verdict made at the close of plaintiff's evidence. There is no merit in this contention. That motion was out of the case for all time after defendant put in her evidence. The question whether the court should have sustained defendant's motion made at the close of all the evidence, is properly before us and must be determined by a consideration of all the evidence. Cook v. Avirgan, Appellate Court, First Dist., 2/12/26; 1 A. 2 d. Hy. Co. v. Veith, 165 Ill. 8; Lawler v. C. & N. I. R. Co., 158 Ill. App. 123.

Plaintiff, being under 7 years of age at the time of the

accident, is conclusively presumed to have been incapable of negligence. Maskaliunas v. C. & W. I. R. R. Co., 318 Ill. 142. Defendant concedes this to be the law. Whether plaintiff was struck by the front fender of defendant's automobile, as she contends, or walked into the side of it, as defendant contends, is not controlling but is an element to be considered. Morrison v. Flowers, 308 Ill., 189.

In the Morrison case an 8 year old boy while running across the street was struck and injured by defendant's automobile, and it was held (p. 197) that "When a motor vehicle is proceeding along at a lawful speed and is obeying all the requirements of the law of the road and all the regulations for operation of such machine, the driver is not, as a general proposition, liable for injuries received by a child who darts in front of the machine so suddenly that its driver cannot stop or otherwise avoid the injury; but if one is running his automobile at a speed in excess of the statutory limit or at an unreasonable or dangerous speed, he cannot escape liability because the child who is injured ran in front of the automobile so suddenly that the accident was then unavoidable."

In the instant case we are of opinion that whether defendant was guilty of negligence was a question of fact for the jury. The accident happened just before the convening of the school and a number of children were gathering at the time. The testimony of the witnesses as to the speed of the car varied from 10 to more than 30 miles an hour. In these circumstances we think it cannot be said that all reasonable minds would reach the conclusion that defendant was not guilty of negligence. The motion to direct a verdict was therefore properly overruled. We are further of opinion that, upon a consideration of all the evidence, we are unable to say the finding and judgment to the effect that defendant was guilty of negligence,

accident, is conclusively presumed to have been incapable of negligence. Mazzaliunas v. C. R. I. & P. Co., 318 Ill. 142. Defendant concedes this to be the law. Whether plaintiff was struck by the front fender of defendant's automobile, as she contends, or walked into the side of it, as defendant contends, is not controlling but is an element to be considered. Korizan v. Flowers, 308 Ill., 196.

In the Korizan case an 8 year old boy while running across the street was struck and injured by defendant's automobile, and it was held (p. 197) that "When a motor vehicle is proceeding along at a lawful speed and is obeying all the requirements of the law of the road and all the regulations for operation of such machine, the driver is not, as a general proposition, liable for injuries received by a child who darts in front of the machine so suddenly that its driver cannot stop or otherwise avoid the injury; but if one is running his automobile at a speed in excess of the statutory limit or at an unreasonable or dangerous speed, he cannot escape liability because the child who is injured ran in front of the automobile so suddenly that the accident was then unavoidable."

In the instant case we are of opinion that whether defendant was guilty of negligence was a question of fact for the jury. The accident happened just before the convening of the school and a number of children were gathering at the time. The testimony of the witnesses as to the speed of the car varied from 10 to more than 30 miles an hour. In these circumstances we think it cannot be said that all reasonable minds would reach the conclusion that defendant was not guilty of negligence. The motion to direct a verdict was therefore properly overruled. We are further of opinion that, upon a consideration of all the evidence, we are unable to say the finding and judgment to the effect that defendant was guilty of negligence,

is against the manifest weight of the evidence.

Defendant further contends that the court erred in permitting plaintiff's father to testify, over objection, for the reason that at the request of plaintiff's counsel at the commencement of the hearing, a rule was entered to exclude all witnesses, and that plaintiff's father was in the court room listening to the witnesses testify before he was called. Plaintiff was not present at the hearing because she was unable to be there, being confined to her bed with a cold and intestinal inflammation; nor was her mother present at the hearing.

In their brief counsel for plaintiff say that it has long been the practice in this state "for both sides to have one representative in court during the trial of a case." But in view of the fact that counsel for plaintiff had moved to exclude all witnesses, it seems to us that the question of whether plaintiff's father be allowed to remain in the court room should have been disposed of before the taking of evidence. We are unable to say, in view of all the facts and circumstances, that the trial court abused his discretion in permitting the witness to testify. In overruling defendant's objection, the court observed that counsel for defendant should have brought to the court's attention the fact that plaintiff's father remained in the court room. We think the court's ruling was proper under the circumstances.

A further complaint is made that plaintiff's attorney made improper argument to the jury. Upon cross-examination of Mrs. Dowdakin, called by plaintiff, it appeared that before the trial she had been interviewed by an investigator representing defendant, the investigator being accompanied by a shorthand reporter who took down what was said at that time. And the position of counsel for plaintiff was that Mrs. Dowdakin was not aware the shorthand reporter was taking down the conversation because the reporter concealed her

is against the manifest weight of the evidence.

Defendant further contends that the court erred in permitting plaintiff's father to testify, over objection, for the reason that at the request of plaintiff's counsel at the commencement of the hearing, a rule was entered to exclude all witnesses, and that plaintiff's father was in the court room listening to the witnesses testify before he was called. Plaintiff was not present at the hearing because she was unable to be there, being confined to her home with a cold and intestinal inflammation; nor was her mother present at the hearing.

In their brief counsel for plaintiff say that it has long been the practice in this state "for both sides to have one representative in court during the trial of a case." But in view of the fact that counsel for plaintiff had moved to exclude all witnesses, it seems to us that the question of whether plaintiff's father be allowed to remain in the court room should have been disposed of before the taking of evidence. We are unable to say, in view of all the facts and circumstances, that the trial court abused his discretion in permitting the witness to testify. In overruling defendant's objection, the court observed that counsel for defendant should have brought to the court's attention the fact that plaintiff's father remained in the court room. We think the court's ruling was proper under the circumstances.

A further complaint is made that plaintiff's attorney made improper argument to the jury. Upon cross-examination of Mrs. Dowskin, called by plaintiff, it appeared that before the trial she had been interviewed by an investigator representing defendant, the investigator being accompanied by a shorthand reporter who took down what was said at that time. And the position of counsel for plaintiff was that Mrs. Dowskin was not aware the shorthand reporter was taking down the conversation because the reporter concealed her

note book behind her pocketbook which she held in her hand. Counsel commented on this and objection was made by counsel for defendant. We think if any error was committed it was not of a serious nature. Jurors are supposed to have the qualifications required by the statute, and a slight error that creeps into the record does not always warrant a reversal.

Defendant further contends that the court erroneously instructed the jury at plaintiff's request, and that the verdict is excessive. In the instruction complained of the court told the jurors that if they found for the plaintiff it would be their duty to determine the amount which should be compensation for the injuries actually suffered by plaintiff, and that in doing so they should consider the nature, etc., of the injuries, whether they were permanent, etc.; that the jury should allow plaintiff such damages for "bodily pain and mental anguish, if any, as, under the evidence, you believe her entitled to; and you should allow her such damages for physical and mental disability, if any such there be, as from the evidence you believe her entitled to." One of the objections made to this instruction is that there was no evidence of mental disability, and we think the contention must be sustained. But we think the error was not reversibly erroneous; it went only to the amount of damages, and while defendant was entitled to have that question properly submitted to the jury, we think the amount awarded is not such as to warrant our interference. In Fitzgerald v. Davis, 237 Ill. App. 488, we said (p. 492): "The law only prohibited the recovery of damages in such a case for mental suffering which results from embarrassment or chagrin and which suffering has no relation to physical pain. Chicago City Ry. Co. v. Anderson, 182 Ill. 298. She might recover for disfigurement which resulted from the accident. We think the argument of counsel taken in connection with the facts in the case was clearly insufficient to warrant us in disturbing the verdict and judgment."

note book behind her pocketbook which she held in her hand. Counsel commented on this and objection was made by counsel for defendant. We think if any error was committed it was not of a serious nature. Jurors are supposed to have the qualifications required by the statute, and a slight error that creeps into the record does not always warrant a reversal.

Defendant further contends that the court erroneously instructed the jury at plaintiff's request, and that the verdict is excessive. In the instruction complained of the court told the jurors that if they found for the plaintiff it would be their duty to determine the amount which should be compensation for the injuries actually suffered by plaintiff, and that in doing so they should consider the nature, etc., of the injuries, whether they were permanent, etc.; that the jury should allow plaintiff such damages for "bodily pain and mental anguish, if any, as, under the evidence, you believe her entitled to; and you should allow her such damages for physical and mental disability, if any such there be, as from the evidence you believe her entitled to." One of the objections made to this instruction is that there was no evidence of mental disability, and we think the contention must be sustained. But we think the error was not reversibly erroneous; it went only to the amount of damages, and while defendant was entitled to have that question properly submitted to the jury, we think the amount awarded is not such as to warrant our interference. In Fitzgerald v. Davis, 237 Ill. App. 450, we said (p. 452): "The law only prohibited the recovery of damages in such a case for mental suffering which results from embarrassment or chagrin and which suffering has no relation to physical pain. Chicago City Ry. Co. v. Anderson, 182 Ill. 390. She might recover for disfigurement which resulted from the accident. We think the argument of counsel taken in connection with the facts in the case was clearly insufficient to warrant us in disturbing the verdict and judgment."

Dr. Arnal, who treated plaintiff for the injuries she sustained, testified that he saw plaintiff shortly after the accident at the hospital, found a "contused wound of the left arm just below the elbow. A tearing *** it extended two-thirds of the way around the arm, *** involving some of the various nerve filaments, a tearing of some of the muscles of the anterior part of the arm, flexor muscle; there was a consiserable hemorrhage," considerable swelling and discoloration; he cleansed the wound out and sutured the muscles with deep stitches, etc.; the child remained in the hospital three days and then returned home; that he treated her for about two months; "this wound was kind of a bumping injury and that resulted in devitalizing the tissues around that area considerably"; that after the child returned home he had her call at his office every few days for treatment; that he treated her off and on until May 28, 1937; "she is still under my care;" that at the present time there is a large scar measuring "two-thirds of the way around the arm, *** there is a tendency to keloid formation in this scar;" that the last time he saw her was the day before the trial (more than three years after the accident); and that the injury to her arm was permanent.

Finding no substantial error in the record, the judgment of the Circuit court of Cook county is affirmed.

JUDGMENT AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

Dr. Arnol, who treated plaintiff for the injuries she sustained, testified that he saw plaintiff shortly after the accident at the hospital, found a "contused wound of the left arm just below the elbow. A tearing *** it extended two-thirds of the way around the arm, *** involving some of the various nerve filaments, a tearing of some of the muscles of the anterior part of the arm, flexor muscle; there was a considerable hemorrhage," considerable swelling and discoloration; he cleaned the wound out and sutured the muscles with deep stitches, etc.; the child remained in the hospital three days and then returned home; she he treated her for about two months; "this wound was kind of a burning injury and that resulted in devitalizing the tissues around that area considerably"; that after the child returned home he had her call at his office every few days for treatment; that he treated her off and on until May 25, 1937; "she is still under care;" that at the present time there is a large scar extending "two-thirds of the way around the arm, *** there is a tendency to keloid formation in this scar;" that the last time he saw her was the day before the trial (more than three years after the accident); and that the injury to her arm was permanent.

Finding no substantial error in the record, the judgment of the circuit court of Cook county is affirmed.

JUDGMENT AFFIRMED.

McGoorty, P. J., and Matchett, J., concur.

40161

ABRAM KARN and ETTA KARN, his wife,
Plaintiffs,

vs.

NORTH WEST SIDE LUMBER COMPANY, a Corporation, ABE I. LURYA and MERCHANTS AND MANUFACTURERS SECURITIES CO., a Corporation,
Defendants.

In the Matter of the Petition of JULIUS H. MINER, Master in Chancery of the Circuit Court of Cook County, to tax Master's fees as costs,
Appellee,

vs.

ABRAM KARN and ETTA KARN, his wife, NORTH WEST SIDE LUMBER COMPANY, a Corporation, ABE I. LURYA and MERCHANTS AND MANUFACTURERS SECURITIES CO., a Corporation,
Respondents.

On Appeal of MERCHANTS AND MANUFACTURERS SECURITIES CO., a Corporation,
Appellant.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

296 I.A. 648

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this appeal the Merchants and Manufacturers Securities Co., a corporation, seeks to reverse an order or decree of the Circuit court of Cook county entered March 2, 1938, in so far as it taxed the Master's costs of $1712.40 against it and awarded execution.

The record discloses that August 22, 1927, complainants gave their note for $25,000 due on or before four months from date, and executed their trust deed to secure same; that September 9, 1929, Abram Karn and his wife Etta filed their bill in chancery against the North West Side Lumber Company, Abe I. Lurya and the Manufacturers Securities company for the removal of the trust deed as a cloud upon their title to the real estate and for the cancellation of the note, upon the surrender by complainants of a stock certificate for 5000 shares of stock of defendant North West Side Lumber Co., issued

ADAM LAUM and RITA LAUM, his wife,
Plaintiffs,

vs.

NORTH WEST SIDE LUMBER COMPANY, a
Corporation, ABE I. LUMYA and MANUFACTURERS
AND SECURITIES COMPANY, a
Corporation,
Defendants.

In the matter of the Petition of JOHN
E. KIRK, Master in Chancery, of the
Circuit Court of Cook County, to tax
Master's Fees as costs.
Appellee,

vs.

ADAM LAUM and RITA LAUM, his wife, NORTH
WEST SIDE LUMBER COMPANY, a corporation,
ABE I. LUMYA and MANUFACTURERS AND SECURITIES
SECURITIES CO., a corporation,
Respondents.

On Appeal of MANUFACTURERS AND SECURITIES
SECURITIES CO., a corporation,
Appellant.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

In this appeal the appellants and manufacturers securities Co., a corporation, seeks to reverse an order or decree of the Circuit court of Cook county, entered March 8, 1928, in so far as it taxed the Master's fees at $171.40 against it and denied exemption.

The record discloses that August 22, 1927, defendants gave their note for $18,000 due on or before four months from date, and executed their trust deed to secure same; that September 9, 1927, Adam Laum and his wife Rita filed their bill in chancery against the North West Side Lumber Company, Abe I. Lumya and the manufacturers securities company for the removal of the trust deed as a cloud upon their title to the real estate and for the cancellation of the note, upon the surrender by complainants of a stock certificate for 500 shares of stock of defendant North West Side Lumber Co., issued

to complainant Abram Karn.

Defendants were served with summons and on October 1, 1929, two defendants, Abe I. Lurya and Merchants and Manufacturers Securities Co., entered their appearance by their solicitor, Ralph M. Schwartzberg. On the same day the appearance of the other defendant, North West Side Lumber Co., was entered by its solicitor, Bernstein, Zolla & Bernstein. Each defendant filed a separate answer. The only allegation of the bill concerning the defendant Merchants and Manufacturers Securities Co. was upon information and belief that the trust deed and note, which were the basis of the suit, had been delivered by complainants to North West Side Lumber Co. and Abe I. Lurya, (president of the Lumber Co.) and that these two defendants had pledged the trust deed and note to defendant Merchants and Manufacturers Securities Co. to secure a loan of $25,000 made by the Securities Co.; that the note and trust deed were in the possession of the Securities Co., and that it had refused to deliver them to complainants. The Securities Co., in its answer filed October 29, alleged that the trust deed and note had been pledged with it to secure a loan, but that the loan had been paid by defendant Lurya and the note and trust deed returned to him and, so far as the Securities Co. knew, they were still in Lurya's possession.

The cause was referred to Master Miner; a great deal of evidence was heard, and May 29, 1930, he made up his report recommending that a decree be entered in favor of the complainants as prayed for. There was no finding or recommendation in the report affecting the Securities Co., and there seems to have been no controversy on the hearing, nor in this court, nor at any time, but that the note and trust deed had been pledged with it as security for a $25,000 loan, and that defendant Lurya had paid the loan and the Securities had returned the note and trust deed to him.

Attached to the report and made a part of it was an itemization by the Master of his fees and charges aggregating $1712.40.

to complainant Abram Karn.

Defendants were served with summons and on October 1, 1920, two defendants, Abe I. Duryea and Bernhardt and Manufacturers Securities Co., entered their appearance by their solicitor, Ralph M. Schwartzberg. On the same day the appearance of the other defendant, Aorta Fast Side Trust Co., was entered by its solicitor, Bernstein, Lolla & Bernstein. Each defendant filed a separate answer. The only allegation of the bill concerning the defendant Merchants and Manufacturers Securities Co. was upon information and belief that the trust deed and note, which are the basis of the suit, had been delivered by complainants to Aorta Fast Side Trust Co. and Abe I. Duryea, (president of the Trust Co.) and that these two defendants had pledged the trust deed and note to defendant Merchants and Manufacturers Securities Co. to secure a loan of $25,000 made by the Securities Co.; that the note and trust deed were in the possession of the Securities Co., and that it had refused to deliver them on complainants. The Securities Co., in its answer filed October 22, alleged that the trust deed and note had been pledged with it to secure a loan, but that the loan had been paid by defendant Duryea and the note and trust deed returned to him and, so far as the Securities Co. knew, they were still in Duryea's possession.

The cause was referred to Master Miner; a great deal of evidence was heard, and May 2, 1930, he made up his report recommending that a decree be entered in favor of the complainants as prayed for. There was no finding or recommendation in the report affecting the Securities Co., and there seems to have been no controversy on the hearing, nor in this court, nor at any time, but that the note and trust deed had been pledged with it as security for a $25,000 loan, and that defendant Duryea had paid the loan and the Securities had returned the note and trust deed to him.

Attached to the report and made a part of it was an itemization by the Master of his fees and charges amounting $172.40.

The payment of this amount is the only matter involved on this appeal. The report, although dated May 29, 1930, was not filed until October 9, 1930. Defendant Lurya filed objections but none was filed by the Securities Co. The objections of Lurya were substantially all overruled. October 31, 1930, which was shortly after the master's report was filed, an order was entered permitting the solicitors for defendants to withdraw and others were substituted. A few weeks thereafter defendant Lurya filed his verified petition setting up a number of matters, among which was that he had discovered other evidence and praying that the matter be re-referred to the master to hear such newly discovered evidence. Complainants filed their answer objecting to the re-reference, but November 25, 1930, an order was entered re-referring the case to Master Miner to hear the additional evidence, and that the cost of the re-reference be taxed against defendant Lurya. There were hearings before the master on the re-reference and considerable evidence was heard. August 10, 1931, the Master made up his supplemental report finding the issues for defendants and recommending that the bill be dismissed for want of equity, "with the costs upon original reference to be taxed against them, as per the Master's Certificate of Services and charges attached to the Original Master's Report heretofore filed herein, and the costs upon the order of rereference, as per the Master's Certificate of Services and charges hereto attached, to be taxed against the defendant herein." The costs on the rereference were $648.05 which are not involved on this appeal.

Complainants filed 40 objections to the Master's Supplemental report. They were all overruled by the Master March 7, 1932. The Supplemental Report, however, was not filed in court until about six years thereafter, viz., February 7, 1938.

About four years prior to this last mentioned date the cause

The payment of this account is the only matter involved on this appeal. The report, although dated May 2, 1930, was not filed until October 9, 1930. Numerous survey filed objections but none was filed by the Securities Co. The objections of Levy were substantially all overruled. October 31, 1930, which was shortly after the Master's report was filed, an order was entered permitting the solicitors for defendants to withdraw and others were substituted. A few weeks thereafter Reinhardt Levy filed his verified petition setting up a number of matters, among which was that he had discovered other evidence and praying that the matter be re-referred to the Master to hear such newly discovered evidence. Complainants filed their answer objecting to the re-reference, but November 25, 1930, an order was entered re-referring the case to Master Miner to hear the additional evidence, and that the cost of the re-reference be taxed against Reinhardt Levy. There were hearings before the Master on the re-reference and considerable evidence was heard. August 10, 1931, the Master made his supplemental report finding the fees for defendants and recommending that the bill be dismissed for want of equity, "with the costs upon original reference to be taxed against them, as per the Master's Certificate of Services and charges attached to the original Master's Report heretofore filed herein, and the costs upon the order of reference, as per the Master's Certificate of services and charges hereto attached, to be taxed against the defendant herein." The costs on the reference were $68.05 which are not involved on this appeal.

Complainants filed 40 objections to the Master's supplemental report. They were all overruled by the Master March 7, 1932. The Supplemental Report, however, was not filed in court until about six years thereafter, viz., February 7, 1938.

About four years prior to this last mentioned date the cause

was on Judge Trude's calendar and January 25, 1934, Judge Trude entered the following order: "This cause being called for trial and neither party appearing to prosecute this suit in their behalf on motion of the court it is ordered that this cause be and the same is hereby dismissed for want of prosecution all costs paid."

February 7, 1938, the date of the filing of the Supplemental Report, as above stated, Master Miner filed his verified petition setting up what he had done in the case; that no part of his fees and charges had been paid, and that they were according to law in all respects; that he had no notice of the calling or dismissal of the suit on November 25, (January 25) 1934, until shortly before he filed his petition. And the prayer was that his fees and charges be taxed as costs against the parties liable therefor. February 18, 1938, the Securities Co. filed its answer to the Master's petition. The other two defendants did not appear - Lurya apparently for the reason that he had gone through bankruptcy and had scheduled any claim the Master might have against him, and he was therefore discharged. In its verified answer the Securities Co. set up, among other things, some of the things that had been done in the cause and that the Master in his Supplemental Report had recommended that the costs and charges on the original reference which are involved in this appeal be taxed against the complainants, and that the costs on the supplemental appeal be taxed against defendant Lurya, which latter the court had ordered when the cause was rereferred; that the Securities Co. in its answer filed had disclaimed any interest in the note or trust deed; that they had been pledged to it as collateral security, that Lurya afterward paid the debt and the note and trust deed were surrendered to him and were then in Lurya's possession.

March 2, 1938, the order appealed from was entered; it recites the coming on for hearing of the matters raised by the

was on Judge Irwin's calendar and January 25, 1924, Judge Irwin entered the following order: "This cause being called for trial and neither party appearing to prosecute this suit in their behalf on motion of the court it is ordered that this cause be and the same is hereby dismissed for want of prosecution all costs paid."

February 7, 1925, the date of the filing of the Supplemental Report, as above stated, Master Fuller filed his verified petition setting up what he had done in the case; that no part of his fees and charges had been paid, and that they were according to law in all respects; that he had no notice of the calling or dismissal of the suit on November 25, (January 25) 1924, until shortly before he filed his petition. And the prayer was that his fees and charges be taxed as costs against the parties liable therefor. February 18, 1925, the Securities Co. filed its answer to the Master's petition. The other two defendants did not appear - Luryea apparently for the reason that he had gone through bankruptcy and had scheduled any claim the Master might have against him, and he was therefore discharged. In its verified answer the Securities Co. set up, among other things, some of the things that had been done in the cause and that the Master in his Supplemental Report had recommended that the costs and charges on the original reference which are involved in this appeal be taxed against the complainants, and that the costs of the supplemental appeal be taxed against defendant Luryea, which latter the court had ordered when the cause was referred; that the Securities Co. in its answer filed had disclaimed any interest in the note or trust deed; that they had been pledged to it as collateral security, that Luryea afterward paid the debt and the note and trust deed were surrendered to him and were then in Luryea's possession.

March 2, 1925, the order appealed from was entered; it recites the coming on for hearing of the matters raised by the

Master's petition and the Securities Co.'s answer; that all of the parties were notified and defendant Lurya was represented by counsel; the court heard the evidence and argument; a number of findings were made; that the charges filed by the Master in his original report were in accordance with the law, were fair, reasonable and proper and should be taxed as costs; that all parties, including the Securities Co., appeared before the Master; that Lurya had been adjudged a bankrupt and had scheduled the Master's fees in the bankruptcy proceeding; that no part of the Master's costs and charges had been paid, contrary to the order of dismissal of January 25, 1934. The court further found that it had no jurisdiction to vacate the order of dismissal except that portion of it pertaining to the Master's costs, and it was decreed that the order of dismissal be corrected accordingly. It was further decreed that the Master's fees and charges, as specified in his oriiginal report, of $1712.40, "be and the same are hereby taxed as costs herein for and on behalf of the said Julius H. Miner, Master in Chancery, against Abram Karn, Etta Karn, North West Side Lumber Company, a corporation, and Merchants and Manufacturers Securities Co., a corporation," and that execution issue.

In his brief counsel for the Securities Co. makes 12 points. The first 10 are to the effect that the order of dismissal of the cause was proper and that the court had no power, after the passage of several terms of court, to modify the order of dismissal. Counsel does not touch upon the merits of the controversy until the 11th point. We think this should have been the first point made. For the purpose of this decision we shall assume that the court was warranted in correcting the record to make it speak the truth - that no part of the master's fees and charges had been paid.

In Bank of Chrisman v. Watson, 277 Ill. 186, the court said (p. 190): "The costs in a chancery case are in the discretion

Master's petition and the Securities Co.'s answer; that all of the parties were notified and defendant Inrye was represented by counsel; the court heard the evidence and argument; a number of findings were made; that the charges filed by the master in his original report were in accordance with the law, were just, reasonable and proper and should be taxed as costs; that all parties, including the Securities Co., appeared before the master; that Inrye had been adjudged a bankrupt and had scheduled the master's fees in the bankruptcy proceeding; that no part of the master's costs and charges had been paid, contrary to the order of dismissal of January 25, 1924. The court further found that it had no jurisdiction to vacate the order of dismissal except that portion of it pertaining to the master's costs, and it was decreed that the order of dismissal be corrected accordingly. It was further decreed that the Master's fees and charges, as specified in his original report, of $1,712.40, "be and the same are hereby taxed as costs herein for and on behalf of the said Julius A. Miner, Master in Chancery, against Albert Kern, Otto Kern, North West Side Lumber Company, a corporation, and Merchants and Manufacturers Securities Co., a corporation," and that execution issue.

In his brief counsel for the Securities Co. makes 12 points. The first 10 are to the effect that the order of his issued in the cause was proper and that the court had no power, after the passing of several terms of court, to modify the order of dismissal. Counsel does not touch upon the merits of the controversy until the 11th point. We think this should have been the first point made. For the purpose of this decision we shall assume that the court was warranted in correcting the record to make it speak the truth - that no part of the master's fees and charges had been paid.

In Bank of Ottawa v. Eaton, 177 Ill. 186, the court said (p. 190): "The costs in a chancery case are in the direction

of the court, but the discretion should be exercised in accordance with the equities of the parties."

The Securities Co. in its answer made no contention that the trust deed and note should not be delivered up to the complainants and cancelled. In fact the only allegation of the bill as to this defendant was that complainants were informed and believed the trust deed and note had been pledged with this defendant. This was admitted by the Securities Co., and it averred in its answer that the debt for which they had been held was paid to it by Lurya and the note and trust deed delivered to him. Our attention has been called to no action on the part of this defendant that would cause any costs to be incurred. But counsel for the Master says that shortly after the original Master's report was filed the Securities Co. employed other counsel, "among whom was Robert Huttner, its own lawyer, who was also secretary of said corporation, to further defend the validity of said mortgage; that Louis F. Jacobson, also a member of the firm employed as new counsel, apparently alarmed at the finding of the master with respect to" the mortgage, made a statement to the Master "that he was retained and employed by the Merchants and Manufacturers Securities Co., a corporation," and that the Master might look to it for the payment of all costs of the reference. The record shows, however, that the petition for re-reference was filed on behalf of Lurya only, and the Master in his Supplemental Report recommended that the Master's fees and costs on the original report should be taxed against the complainants. While obviously the master should be paid for his services, which took more than 200 hours, we think it inequitable and contrary to law to require that he be paid by the Merchants and Manufacturers Securities Co.

The order of the Circuit court of Cook county appealed from is reversed so far as it taxed costs against the Merchants and Manufacturers Securities Co.

ORDER REVERSED.

McSurely, P. J., and Matchett, J., concur.

of the court, but the discretion should be exercised in accordance with the equities of the parties."

The Securities Co. in its answer made no contention that the trust deed was more should not be delivered to the complainants and cancelled. In fact the only allegation of the bill as to this defendant was that counsel had very interested and believed the trust deed was not had been alleged with this defendant. This was admitted by the Securities Co., and it averred in its answer that the $ 25 for which they had been held was paid to it by Lucy and the note and trust deed delivered to him. Our attention has been called to no action on the part of this defendant that would cause any doubt to be inserted. But counsel for the master says that shortly after the original master's report was filed the Securities Co. employed other counsel, "among whom was Robert Lutcher, its own lawyer, who was also secretary of said corporation, to interest herein the validity of said mortgage; that Louis T. Goodman, also a member of the firm employed as new counsel, apparently alarmed at the "failing of the master with respect to" the mortgage, made a statement to the master "that he was retained and employed by the Securities and Manufacturers Securities Co., a corporation," and that the master might look to it for the payment of all costs of the reference. The record shows, however, that the petition for re-reference was filed on behalf of Lucy only, and the master in his supplemental report recommended that the master's fees be taken on the original report should be taxed against the complainants. While obviously the master should be paid for his services, which took more than 200 hours, we think it inequitable and contrary to law to require that he be paid by the Securities and Manufacturers Securities Co.

The order of the circuit court of Cook county overruling from is reversed so far as it takes costs against the Securities and Manufacturers Securities Co.

ORDER REVERSED.

Scurlock, P. J., and Barnett, J., concur.

9311

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 3rd day of May, in the year of our Lord one thousand nine hundred and thirty-eight, within and for the Second District of the State of Illinois:

Present -- The Hon. FRANKLIN R. DOVE, Presiding Justice
Hon. FRED G. WOLFE, Justice
Hon. BLAINE HUFFMAN, Justice
JUSTUS L. JOHNSON, Clerk
RALPH H. DESPER, Sheriff

296 I.A. 648 2

BE IT REMEMBERED, that afterwards, to-wit: On MAY 25 1938 the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

Gen. No. 9311 Agenda No. 12

IN THE APPELLATE COURT OF ILLINOIS,

SECOND DISTRICT

MAY TERM, A.D. 1938.

MARY JACOBS,

Appellee

vs.

HARRY JACOBS,

Appellant.

Appeal from Circuit Court of LaSalle County.

HUFFMAN - J.

This appeal is prosecuted by appellant from an order of the Circuit Court of LaSalle county committing him to the common jail of said county for contempt for failure to pay alimony. Evidence was heard upon three different days. At the conclusion thereof the court took the matter under advisement, rendering the above order about a week after the conclusion of the evidence.

Appellant urges for reversal that the evidence disclosed his financial inability to pay the alimony, thus exonerating him for failure to comply with the decree. The record on this appeal consists only of the complaint and answer, orders of the court, together with motion of appellant, filed in the trial court, to vacate the order of contempt. Since no evidence is preserved by the record, this court is unable to determine the nature and effect of the same with respect to the order complained of. The order makes the following specific findings:

> "That no sufficient cause is shown by the said defendant why said arrears of alimony pendente lite should not be paid or that he has been, or is, unable to pay the same.
>
> "That the defendant has wilfully refused to advise this court of the nature and character of his income and the source thereof, and has failed to exhibit to this court his books and

Gen. No. 9411 Agenda No. 18

IN THE APPELLATE COURT OF ILLINOIS,

SECOND DISTRICT

MAY TERM, A.D. 1932.

MARY JACOBS,

Appellee

vs.

HARRY JACOBS,

Appellant.

Appeal from Circuit Court of LaSalle County.

MUTTMAN - 1.

This appeal is prosecuted by appellant from an order of the Circuit Court of LaSalle county committing him to the common jail of said county for contempt for failure to pay alimony. Evidence was heard upon three different days. At the conclusion thereof the court took the matter under advisement, rendering the above order about a week after the conclusion of the evidence.

Appellant urges for reversal that the evidence disclosed his financial inability to pay the alimony, thus exonerating him for failure to comply with the decree. The record on this appeal consists only of the complaint and answer, orders of the court, together with motion of appellant, filed in the trial court, to vacate the order of contempt. Since no evidence is preserved by the record, this court is unable to determine the nature and effect of the same with respect to the order complained of. The order makes the following specific findings:

> "That no sufficient cause is shown by the said defendant why said arrears of alimony pendente lite should not be paid or that he has been, or is, unable to pay the same.
>
> "That the defendant has willfully refused to advise this court of the nature and character of his income and the source thereof, and has failed to exhibit to this court his books and

> records of his business showing his income and his expenditures.
>
> "That he, the said defendant, wilfully fails and refuses to obey the decree of this court by paying said alimony pendente lite."

One attached for contempt of court for failure to pay alimony has the burden of proving that, acting in good faith and with an honest purpose to comply with the order of the court, he was unable to do so. Deen v. Bloomer, 191 Ill. 416, 423. To the same effect are Shaffner v. id, 212 Ill. 492, 496; Hengen v. id, 271 Ill. 278, 284. In the above cases it is held that the failure to pay alimony is prima facie evidence of contempt, and where it is sought to show that the failure to pay is due to the inability of the defendant, he must show with reasonable certainty, the amount of money he has received since the order was made and that it has been disbursed in the payment of expenses, which under the law, he should pay before making any payment on the decree for alimony. There is nothing in this record going to show the property of the defendant, the money received by him since the decree for alimony, or the manner in which such money was expended. His answer filed, in respect to these items, is of a most general character and wholly insufficient to afford any information thereon.

A reviewing court cannot pass upon the rights of the parties except as they arise upon the record. The general rule is that the judgment or decree of the lower court will be affirmed where the record is insufficient for the purpose of review of the questions assigned. And further, the rule is that no error will be presumed to have occurred, and that the proceedings will be presumed to have been without error, in the absence of a properly preserved showing to the contrary.

Appellant insists it must affirmatively appear that the party has the means wherewith to comply with the order, and that his failure to do so should not subject him to imprisonment except in cases where it shall appear he has the pecuniary ability to enable

records of his business showing his income and his expenditures.

"That he, the said defendant, wilfully fails and refuses to obey the decree of this court by paying said alimony pendente lite."

One attached for contempt of court for failure to pay alimony has the burden of proving that, acting in good faith and with an honest purpose to comply with the order of the court, he was unable to do so. Deen v. Bloomer, 191 Ill. 416, 423. To the same effect are Shaffner v. id, 218 Ill. 492, 496; Vergon v. id, 271 Ill. 272, 284. In the above cases it is held that the failure to pay alimony is prima facie evidence of contempt, and where it is sought to show that the failure to pay is due to the inability of the defendant, he must show with reasonable certainty, the amount of money he has received since the order was made and that it has been disbursed in the payment of expenses, which under the law, he should pay before making any payment on the decree for alimony. There is nothing in this record going to show the property of the defendant, the money received by him since the decree for alimony, or the manner in which such money was expended. His answer filed, in respect to these items, is of a most general character and wholly insufficient to afford any information thereon.

A reviewing court cannot pass upon the rights of the parties except as they arise upon the record. The general rule is that the judgment or decree of the lower court will be affirmed where the record is insufficient for the purpose of review of the questions assigned. And further, the rule is that no error will be presumed to have occurred, and that the proceedings will be presumed to have been without error, in the absence of a properly preserved showing to the contrary.

Appellant insists it must affirmatively appear that the party has the means wherewith to comply with the order, and that his failure to do so should not subject him to imprisonment except in cases where it shall appear he has the pecuniary ability to enable

him to comply with the decree, and wilfully refuses to do so. (Citing Blake v. The People, 80 Ill. 1.). Appellant further urges that the order in this case fails to find his financial ability to comply with the decree, and his failure so to do. The burden is upon appellant to establish his inability to pay in order that he may be exonerated for his failure in this respect. The order finds that appellant showed no sufficient cause why he was unable to pay the alimony in question, and that he wilfully refused to advise the court of the nature and character of his income or the source thereof, or to exhibit evidence of his income and expenditures. In cases of this character, the court is empowered to punish willful obstinacy by imprisonment. O'Callaghan v. id. 69 Ill. 552, 554. With respect to the findings in the order, it was held by this court in the case of Edward Hines Lumber Co. v. G.L. Chemical Works, 237 Ill. App. 246, at p. 257, "It is a well established doctrine in this state that where a party in a chancery case seeks to reverse a decree on the ground that it is not supported by the evidence, he must bring all the evidence there is in the record before he can insist that the decree be reversed upon that ground. If he does not do this, it will be presumed that there was sufficient evidence in the record to support the decree." (Cases cited).

The order of the trial court is affirmed.

Order affirmed.

him to comply with the decree, and willfully refuses to do so. (Citing Blake v. The People, 20 Ill. 1.). Appellant further urges that the order in this case fails to find his financial ability to comply with the decree, and his failure so to do. The burden is upon appellant to establish his inability to pay in order that he may be exonerated for his failure in this respect. The order finds that appellant showed no sufficient cause why he was unable to pay the alimony in question, and that he willfully refused to advise the court of the nature and character of his income or the source thereof, or to exhibit evidence of his income and expenditures. In cases of this character, the court is empowered to punish willful obstinacy by imprisonment. Williamson v. id. 68 Ill. 588, 594. With respect to the findings in his favor, it was held by this court in the case of Edward Hines Lumber Co. v. G.L. Dunstedt Works, 327 Ill. 239, 246, at p. 247, "It is a well established doctrine in this state that where a party in a chancery case seeks to reverse a decree on the ground that it is not supported by the evidence, he must bring all the evidence there is in the record before us and insist that the decree be reversed upon that ground. If we have not do this, it will be presumed that there was sufficient evidence in the record to support the decree." (Cases cited).

The order of the trial court is affirmed.

Order affirmed.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32) 7

1315

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 3rd day of May, in the year of our Lord one thousand nine hundred and thirty-eight, within and for the Second District of the State of Illinois:

Present -- The Hon. FRANKLIN R. DOVE, Presiding Justice
Hon. FRED G. WOLFE, Justice
Hon. BLAINE HUFFMAN, Justice
JUSTUS L. JOHNSON, Clerk
RALPH H. DESPER, Sheriff

296 I.A. 648[3]

BE IT REMEMBERED, that afterwards, to-wit: On JUN 22 1938 the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

Gen. No. 9315 Agenda No. 14

In the Appellate Court of Illinois

Second District

May Term, A. D. 1938.

Theodore Wille,

Appellant,

vs.

William H. Claus,

Appellee.

Appeal from the Circuit Court of Will County

DOVE - P. J.

On April 22, 1932, Theodore Wille recovered a judgment for $162. 50 against John Storbeck before a Justice of the Peace. Storbeck prosecuted an appeal to the Circuit Court of Will County and an appeal bond was executed by Wille with William H. Claus as surety. Subsequently the appeal was dismissed in the Circuit Court for want of prosecution and a writ of Procedendo awarded on January 25, 1936. On February 25, 1936 the Justice of the Peace issued an execution upon said judgment which was duly served on Storbeck the day it was issued. On the following day Storbeck filed a schedule of his personal property disclosing that all the property enumerated therein except his household goods were encumbered by a chattel mortgage. On May 10, 1936, the officer returned the execution with the endorsement that no property was found subject to execution and returning it unsatisfied.

On April 6, 1937 this suit was then instituted by Wille against William H. Claus, the surety on the appeal bond. A jury was waived and the cause submitted to the court for determination, resulting in a finding by the court that the appeal bond was not filed with the Justice as provided by statute and that the execution served upon Storbeck was not served in the manner provided by law and therefore the defendant, as surety on said appeal bond, was not liable. Judgment in favor of the defendant, dismissing the

Gen. No. 9912

Issue No. 13

In the Appellate Court of Illinois

Issue Statute

New York, N. Y. 1941.

Theodore Hill,

Appellant,

vs.

William H. Olson,

Appellee.

Appeal from the Circuit Court

of Hill County

DOYS - P. J.

On April 22, 1938, Theodore Hill recovered a judgment for $1825. So against him between dates a decree of the Peace. Storbook presented an appeal to the Circuit Court of Hill County and an appeal bond was executed by Hill with William H. Olson as surety. Subsequently the appeal was dismissed in the Circuit Court for want of prosecution and a writ of procedendo entered on January 22, 1940. On January 27, 1940 the judge of the Peace issued an execution upon said judgment which was duly served on Storbook the day it was issued. On the following day Storbook filed a schedule of his personal property disclosing that all the property exempted therein except his homestead was encumbered by a duplicate mortgage. On May 1, 1940, the officer secured the execution with the endorsement that no property was found subject to execution and returned it unsatisfied.

On April 8, 1947 this suit was then instituted by Hill against William H. Olson, the surety on the appeal bond. A jury was waived and the cause submitted on the court for determination, resulting in a finding by the court that the appeal bond was not filed with the Justice as provided by statute and that the execution served upon Storbook was not served in the manner provided by law and therefore the judgment, as entered, is void and appeal bond, was not liable. Judgment in favor of the defendant, dismissing the

complaint at the costs of the plaintiff, was rendered and plaintiff has prosecuted this appeal.

The record discloses that a judgment for $162.50 in favor of appellant and against John Storbeck was rendered on April 22, 1932 by E. M. King, a Justice of the Peace. That Storbeck appealed from that judgment and executed with appellee the appeal bond which forms the basis of this suit. This appeal bond is dated April 25, 1932 and is in the usual form. After reciting the judgment rendered in favor of appellant and against Storbeck, it provides, among other things, that if Storbeck shall prosecute his appeal with effect and pay whatever judgment may be rendered against him by the court to which the appeal is taken, or in case the appeal is dismissed, then if Storbeck will pay the judgment rendered against him by the Justice together with all costs, then the obligation of appellee to be void, otherwise to remain in full force and effect. The record further discloses that this appeal bond bears the following endorsement: "taken and approved by me, at my office this____day of April A. D. 1932. E. M. King, Justice of the Peace", and it further appears that it was filed in the office of the Clerk of the Circuit Court of Will County on May 16, 1932.

To sustain the judgment of the trial court, counsel for appellee insist that the record does not disclose that the appeal bond was ever filed with the Justice of the Peace as required by the statute; that the bond not having been so filed, no appeal was in fact perfected and appellee cannot be held liable. Counsel argue that even though the record shows that the bond was taken and approved by the justice, it is not shown when it was taken and approved and does not show as a matter of fact, that it was filed with the justice. In support of this contention, counsel cite and rely upon Newby v. Yellen, 257 Ill. App. 526; Freeland v. Estate of Freeland, 245 Ill. pp. 286; and Rybarczyk v. Weglarz, 204 Ill. App. 232. These cases annouce the rule that the right of appeal is

complaint at the costs of the plaintiff, was reversed and plaintiff has prosecuted this appeal.

The record discloses that a judgment for $1,000.00 in favor of appellee and against John Stormont was rendered on April 10, 1922 by E. E. King, a justice of the peace. That Stormont appealed from that judgment and executed with appellee his bond which also forms the basis of this suit. This appeal bond is dated April 10, 1922 and is in the usual form. After recalling the judgment rendered in favor of appellee and against Stormont, it provides, among other things, that if Stormont shall prosecute his appeal with effect and pay whatever judgment may be rendered against him by the court to which the appeal is taken, or if he does the appeal be dismissed, then if Stormont will pay the judgment rendered against him by the justice together with all costs, then the obligation of appellee to be void, otherwise to remain in full force and effect. The record further discloses that this appeal bond bears the following endorsement: "Taken and approved by me, this 10 day of April E. E. King, J. P. King, Justice of the Peace", and it further appears that it was filed in the office of the clerk of the circuit court of Will County on May 16, 1922.

To sustain the judgment of the trial court, counsel for appellee insist that the record fail to disclose that the appeal bond was ever filed with the justice of the peace as required by the statute; that the bond not having been so filed, the appeal was in fact prosecuted had appellee taken a default judgment. Counsel argue that even though the record shows that the bond was taken and approved by the justice, it is not shown that it was signed and approved and did not show on a review of it, that it was filed with the justice. In support of this contention, counsel cite and rely upon Kelly v. Yellon, 87 Ill. App. 324; Freeland v. Morris et Freeland, 243 Ill. 27, 328; and Dunnavey v. Hughes, 90 Ill. App. 232. These cases announce the rule that the right of appeal is

statutory and that there must be a substantial compliance with the provisions of the statute before an appeal is perfected. Those cases in our opinion throw no light upon the issue here. The obligor on an appeal bond is estopped to deny the recitals of the bond. He can not be heard to say that an appeal bond is a nullity or question the truth of the recitals in the bond. He is bound by the recitals therein. Harding v. Kuessner, 172 Ill. 125; Meserve v. Clark, 115 Ill. 580. In the instant case Storbeck and appellee, his surety, by signing this bond obtained all the benefits thereof and are not estopped from denying its binding obligation. Courson v. Browning, 78 Ill. 208. This appeal bond in the instant case recites: "The condition of the above obligation is such, that, whereas, the said Theodore Wille did, on the 22nd day of April, A. D. 1932 before E. M. King, a justice of the peace for said County of Will, recover a judgment against the above bounden John H. Storbeck for the sum of $162.50 and costs of suit, from which said judgment the said John H. Storbeck has taken an appeal to the Circuit Court of the County of Will aforesaid and State of Illinois. Now, if the said John H. Storbeck shall prosecute his appeal with effect * * * or in case the appeal is dismissed, will pay the judgment rendered against him by said justice and all costs that have been made before said justice and all costs occasioned by said appeal, then the above obligation to be void, otherwise to remain in full force and effect". The record affirmatively shows this bond was, as a matter of fact, approved by the justice who rendered the judgment;that thereafter the cause was pending in the Circuit Court of Will County and it was not until January 25, 1936 that a writ of procedendo was issued by the Clerk of that Court to the Justice of the Peace, which recited that by reason of the fact that Storbeck had taken an appeal from the judgment of the justice, the proceedings before said justice had been stayed and directed the justice to proceed on said judgment in all respects as if the said appeal had never

statutory and that there must be a substantial compliance with the provisions of the statute before an appeal is perfected. These cases in our opinion throw no light upon the issue here. The opinion on an appeal bond is entitled to carry the residuum of the mind. It can not be heard to say that an appeal bond is a nullity or question the trust of the realmis in the bond. It is bound by the recitals therein. Durfee v. Duggan, 197 Ill. 120; Searle v. Sidey, 112 Ill. 350. In the instant case Stanton and Appelles, his surety, by signing this bond obtained all the benefits thereof and are not relieved from demying its binding obligations. Cameron v. Brownlee, 76 Ill. 608. This appeal bond in the instant case recites: "The condition of the above obligation is such, that, whereas, the said Thompson Hills did, on the 22nd day of April, A. D. 1932 before A. E. Ide, a Justice of the peace for said County of Cook, recover a judgment against the above bounden John H. Stanton for the sum of $100.00 and costs of suit, from which said judgment the said John H. Stanton has taken an appeal to the Circuit Court of the County of Cook and State of Illinois. Now, if the said John H. Stanton shall prosecute his appeal with effect * * * or in case the appeal is dismissed, will pay the judgment rendered against him by said Justice and all costs that have been made before said Justice and all costs occasioned by said appeal, then the above obligation to be void, otherwise to remain in full force and effect." The record affirmatively shows, this bond was, as a matter of fact, approved by the Justice who rendered the judgment, that therefor the court was passing in the Circuit Court of Cook County and it was not until January 23, 1932 that a suit of procedendo was issued by the Clerk of that Court to the Justice of the Peace, which recited that by reason of the fact that Stanton had taken an appeal from the judgment of the Justice, the proceedings before said Justice had been stayed and directed the Justice to proceed on said judgment in all respects as if the said appeal had never

been taken. We are of the opinion that in this proceeding appellee is estopped from denying the binding obligation of this bond. Moses v. Royal Indemnity Company, 276 Ill. 177.

It is next insisted by counsel for appellee that there is no competent evidence in this record proving that there has been a legal effort made to collect this judgment from Storbeck. The record discloses that counsel for appellant offered in evidence a copy of the execution issued by the Justice on February 25, 1936, the return thereon, a copy of the schedule filed on behalf of John Storbeck and a copy of the procedendo issued by the Clerk of the Circuit Court of Will County. Attached to these several instruments was the certificate of Ernest M. King, the Justice of the Peace, rediting that he was a Justice of the Peace in and for the Town of Crete in Will County, Illinois and he certified that the attached execution is a true copy of a certain execution with the return thereon, which was issued out of his office as such Justice of the Peace on February 25, 1936 in the case of Theodore Wille v. John Storbeck; that the attached schedule is a true copy of a certain schedule of personal property filed in his office on behalf of John Storbeck on February 26, 1936 and that the annexed attached procedendo is a true copy of the original thereof received by him as Justice of the Peace from the Clerk of the Circuit Court of Will County. His certificate concludes: "Given under my hand and seal this 7th day of August, A. D. 1937. E. M. King (Seal) Justice of the Peace". The objection to this certificate is that the statute provides that the proceedings before a Justice of the Peace may be proved by a certified copy thereof under the hand and private seal of the Justice and that this certificate does not bear the private seal of the Justice. A justice court is not a court of record and this certificate is signed by the justice and following his signature purports to be sealed with his private seal.

been taken. We are of the opinion that in this proceeding appellee is estopped from denying the binding obligation of this seal. Dawson v. Royal Indemnity Company, 275 Ill. 177.

It is not insisted by counsel for appellee that there is no competent evidence in this record proving that there has been a legal effort made to collect this judgment from defendant. The record discloses that counsel for appellant offered in evidence a copy of the execution issued by the justice on February 24, 1933, the return thereon, a copy of the garnishee filed in behalf of Goodrich and a copy of the proceedings issued by the clerk of the Circuit Court of Hill County. Attached to these general instruments was the certificate of Grant V. Kirk, the justice of this county, reciting that he had a docket of the Peace in and for the town of Orete in Hill County, Illinois and he certifies that the attached execution is a true copy of a docket entry with the return thereon, which was issued out of his office in such docket of the Peace on February 24, 1933 in the case of Goodrich Hill v. John Gorbook; that the attached execution is a true copy of a certain schedule of personal property filed in his office on behalf of John Gorbook on February 24, 1933 and that the annexed attached proceedings is a true copy of the original thereof received by him as Justice of the Peace from the clerk of the Circuit Court of Hill County. His certificate concludes, "Given under my hand and seal this 7th day of August, A. D. 1937. G. V. Kirk (Seal) Justice of the Peace". The objection to this certificate is that the statute provides that the proceedings before a justice of the Peace may be proved by a certified copy thereof under the hand and private seal of the Justice and that this certificate does not bear the private seal of the Justice. A Justice court is not a court of record and this certificate is signed by the Justice and following his signature purports to be sealed with his private seal.

There is no merit in appellee's contention that no legal effort was made to collect the judgment from the defendant Storbeck. The evidence is that the execution was properly issued, was duly served and that on the following day Storbeck filed with the justice a schedule of all of his personal property and that subsequently the execution was returned by the officer with the statement that Storbeck had no personal property in the county out of which the judgment could be made and the writ was returned "No Property Found and in no part satisfied".

Appellee set up no defense in his answer and under the evidence as found in this record, he is clearly liable. The judgment of the trial court is reversed and the cause remanded to the Circuit Court of Will County with directions to enter judgment in favor of appellant and against appellee for $162.50, together with interest thereon from April 22, 1932 and costs.

Reversed and Remanded with Directions.

There is no merit in appellee's contention that no issue offered was made to subject the judgment from the instrument introduced. The evidence is that the execution was properly issued, the sheriff served and that on the following day Jackson filed his motion a schedule of all of his personal property and that subsequently the execution was returned by the officer with the statement that Jackson had no personal property in the county out of which the judgment could be made and the writ was returned "No property found and in no part satisfied".

Appellee set up no defense in his answer and after the evidence on trial in this record, he is clearly liable. The judgment of the lower court is reversed and the cause remanded to the circuit court of Hill County with directions to enter judgment in favor of appellant and against appellee for $100.00, together with interest thereon from April 24, 1907 and costs.

Reversed and remanded with directions.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32) 7

1321

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 3rd day of May, in the year of our Lord one thousand nine hundred and thirty-eight, within and for the Second District of the State of Illinois:

Present -- The Hon. FRANKLIN R. DOVE, Presiding Justice
Hon. FRED G. WOLFE, Justice
Hon. BLAINE HUFFMAN, Justice
JUSTUS L. JOHNSON, Clerk
RALPH H. DESPER, Sheriff

296 I.A. 648[4]

BE IT REMEMBERED, that afterwards, to-wit: On JUN 22 1938 the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

appellee, the purchase of the crane was made, and that appellee believes it was made for the benefit of appellant, as an undisclosed principal in the transaction. It is further alleged that the crane was shipped to appellant at its yards in Joliet, at the instruction of Louis Livingston; that the same was received by appellant and since said time has been in the control and use of appellant; that Louis Livingston, since the sale of the crane and the information received by appellee with respect to appellant, has never definitely indicated whether he was acting for himself or as agent for appellant . It is alleged that part of the notes agreed to be shipped by Louis Livingston to appellee as partial payment for the purchase price of the crane, were at the time of the agreement the property of and in possession of appellant; that appellee is in doubt and is unable to determine the true and correct facts in the case with respect as to whether Louis Livingston was acting for himself or acting as agent for appellant, or whether appellant later ratified such acts, and accepted the benefits thereof. Appellee alleges that it is entitled to relief and judgment in the case for the purchase price of the crane; that the time of final payment has long since elapsed and asks for relief in the alternative against either Louis Livingston or appellant corporation.

Appellant filed its answer disclaiming all knowledge or information with respect to the sale of the crane by appellee to Louis Livingston, denied that Louis Livingston was an agent of appellant in such transaction, or that he was a general agent of appellant; and set up that it purchased the crane from Louis Livingston for a valuable consideration. Louis Livingston by his answer admitted the purchase of the crane for $1000, and denied that he was acting at the time as an agent for appellant.

The cause was tried by jury, which returned a verdict finding for plaintiff and against appellant in the sum of $1600.00. Judgment was entered upon the verdict and appellant prosecutes this appeal. Louis Livingston is not a party to this appeal.

The evidence on behalf of appellee discloses that Hyman Feinberg was a resident of Chicago, engaged in the smelting business and in charge of appellee company, with authority to buy and sell on its account; that in May, 1934, Louis Livingston came to appellee's yards in Chicago, to look at the crane in question, which was for sale. The parties could not agree upon the price and Mr. Livingston left the premises. Some time in the following October, Mr. Feinberg was in Rock Island in company with Mr. Berkson. There he met Mr. Livingston and the subject of the crane was brought up. Feinberg and Berkson went out to appellant's yards in East Moline, where Louis Livingston showed them through the plant, showed them a bin of white metal and one of red metal, the value of which Feinberg considered to be from seven to eight hundred dollars. He states that Livingston said he wanted to sell this metal, and that they then went into the office of appellant company, where the crane was sold for $1600; that it was to be paid for by shipping the white metal and red metal to the order of appellee company, and paying a balance of $800 in cash, within one year; that Livingston then called the railroad company and made arrangements for a man to be sent to appellee's yards in Chicago to supervise the loading of the crane. The witness Feinberg returned to Chicago, on Saturday night. He states that on Monday or Tuesday following, Louis Livingston came to appellee's yards with another man to examine the crane. One of appellee's employees started the crane and demonstrated it for Livingston and his companion. They examined the crane following this demonstration, and Livingston told the witness to proceed to have it loaded on the railroad cars. The man with Livingston at this time was Paul Hackendorf, who lived in Davenport, Iowa, and

The cause was tried by jury, which returned a verdict finding for plaintiff and against appellant in the sum of $1500.00. Judgment was entered upon the verdict and appellant prosecutes this appeal. Louis Livingston is not a party to this appeal.

The evidence on behalf of appellee discloses that Oscar Feinberg was a resident of Chicago, engaged in the jewelry business and in charge of appellee company, with authority to buy and sell on its account; that in May, 1918, Louis Livingston came to appellee's yards in Chicago, to look at the cattle in question, which was for sale. The parties could not agree upon the price that day. Livingston left the premises. Some time in the following October, Mr. Feinberg was in Rock Island in company with Mr. Jackson. There he met Mr. Livingston and the subject of the cattle was brought up. Feinberg and Jackson went out to appellant's yards in East Moline, where Louis Livingston showed them through the plant, showed them a bin of white metal and one of red metal, the value of which Feinberg considered to be from seven to eight hundred dollars. He stated that Livingston said he wanted to sell this metal, and that they then went into the office of appellant company. There the cattle was sold for $1500; that it was to be paid for by supplying the white metal and red metal to the order of appellee company, and paying a balance of $500 in cash, within one year; that Livingston then called the railroad company and made arrangements for a man to be sent to appellee's yards in Kansas to supervise the loading of the cattle. The witness Feinberg returned to Chicago, on Saturday night. He states that on Sunday or Monday following, Louis Livingston came to appellee's yards with another man to examine the cattle. One of appellee's employees started the cattle and demonstrated it for Livingston and his companion. They examined the cattle following this demonstration, and Livingston told the witness to proceed to have it loaded on the railroad cars. The man with Livingston at this time was Paul Buckenhorf, who lived in Davenport, Iowa, and

worked for the Davenport Locomotive Works. Feinberg testifies that Hackendorf told Livingston at the time the crane was being operated for their inspection, and following their examination thereof, that he should have it taken to the shops of the Davenport Locomotive Works, overhauled and put in shape, before sending it to the yards of appellant, stating that such would cost about $1000.

The crane was loaded and shipped to appellant, unloaded at its yards, and put in service. Appellee received no payment thereon, and after about thirty days, made demand for payment according to the alleged agreement. Following this, appellee received the following letter upon the corporate stationery of appellant:

"Yards:
Moline, Ill.
East Moline, Ill.

Iron and Steel Scrap
New and Relaying Rails.

Midland Iron & Steel Corp.

Phones
Rock Island 400
East Moline 402

General Office
211 20th Street

Salvage Material
of all kinds.

Rock Island, Illinois
November 26th, 1934.

Chicago Smelting & Refining Co.,
2457-69 S. Loomis Street
Chicago, Illinois.

Gentlemen:

I have your communication of November 23rd. You might have heard from me before this but I was absent from the city for the last two weeks.

In reference to the metals you write about will say that at the time you and Mr. Berkson were here I told you I expected to get in some more of the babbit shavings and we will make the shipment all together. I expect to get some in the first of the month. As for the red metal for Berkson, I will ship it as soon as I get enough for a load. I don't want to ship one ton or two. I want to ship a load and I am sure Mr. Berkson is not worried about it as we have no definite price on same and I am well satisfied we will get along when I get ready to ship it.

In reference to the crane I will say that I am very much disappointed in it. In the first place the crane was stripped of all the bearings and the radiator had a big hold in it, which I did not see when I was in Chicago. However, that might have been done in the railroad yards, for I understand it was kept in the railroad yards about ten days before it was shipped. All the bolts were cut with a torch and I am sure that must have been done on your premises while loading it.

worked for the Davenport Locomotive Works. Keighley testifies that Hockenbort told Livingston at the time the crane was being operated for their inspection, and following their examination thereof, that he would have it taken to the shops of the Davenport Locomotive works, overhauled and put in shape, before sending it to the yards of appellant, stating that such would cost about $1000.

The crane was loaded and shipped to appellee, unloaded at its yards, and put in service. Appellee received no payment thereon, and after about thirty days, made demand for payment according to the alleged agreement. Following this, appellee received the following letter upon the corporate stationery of appellant:

"Yards:
Moline, Ill. Rock Island Yards
East Moline, Ill.

Thomas Industrial Iron & Steel Corp.
Rock Island 400 General Office Railroad Material
East Moline 400 111 20th Street of all kinds.

Rock Island, Illinois
November 20th, 1941.

Chicago Heating & Plumbing Co.,
2427-29 S. Loomis Street
Chicago, Illinois.

Gentlemen:

I have your communication of November 23rd. I might have sent it to you before this but I was absent from the city for the last two weeks.

In reference to the crane you write about will say that at the time you was here, between were here I said the I speaker in not in some more of and bought anything and we will make the arrangement all together. I expect to get some in the first of the month. As for the rail for Peirson, I will ship it as soon as I get enough for a load. I don't want to ship one car or two. I want to ship a load and I am sure in. Jackson is not worried about it as we have no definite price on same and I am most satisfied we will get along when I get ready to ship it.

In reference to the crane I will say that I am very much disappointed in it. In the first place the crane was stripped of all the bearings and the radiator had a big hole in it, which I did not see when I was in Chicago. However, that might have been done in the railroad yards, for I understand it was kept in the railroad yards about ten days before it was shipped. All the bolts were out with a torch and I am sure that just have been done on your premises while loading it.

To make the story short my people here are telling me that the crane came here practically as a piece of junk instead of a crane, and we have been working on it trying to fix it up for the last two weeks and we haven't got it running yet.

We had to have a great many parts made for it and some are still in the making and I want you to understand we are not trying to overhaul this crane, we are just trying to get it to run and do at least some of the work and that is going to run us into quite a large expense and I expect you to stand for same. We bought the crane from you, not as a new crane, but as a crane in good running condition and working order. I think this can be verified by Mr. Meyer Berkson and as soon as we have the crane so it will run we will send you the expenses that we had on same in getting it to run.

Yours very truly,

Midland Iron & Steel Corp.
L. Livingston.

cc/ to Mr. Meyer Berkson.

The testimony of Louis Livingston is to the effect that he is not interested in appellant company, and not in its employ in any capacity, but that he does quite an amount of business for appellant. He details his visits to appellee's yards in Chicago, where on the first trip, the price could not be agreed upon. He tells about his subsequent trip in October to appellee's yards, in company with Mr. Hackendorf, to look at the crane. He understood at that time that a gentleman by the name of Rabinofski was interested in the purchase of the crane. He states that Feinberg wanted $2000 for it and that he told Feinberg that maybe he could interest appellant in the purchase of it, as he knew appellant was on the market for a crane. He offered Feinberg $1500, and they finally agreed upon a price of $1600. He states that at appellant's yards, he told Feinberg that before the deal was to be considered definite, he wanted to go to the yards of appellee and again see the crane. It was following this, that Livingston went to appellee's yards with Hackendorf, where the crane was demonstrated, and where they inspected and examined it, the deal made and the crane shipped as aforesaid.

To make the story short my people here are telling me that the crane came here practically as a piece of junk instead of a crane, and we have been working on it trying to fix it up for the last two weeks and we haven't got it running yet.

We had to have a great many parts made for it and some are still in the making and I want you to understand we are not trying to overhaul this crane, we are just trying to get it to run and do at least some of the work and that is going to run us into quite a large expense and I expect you to stand for same. We bought the crane from you, not as a new crane, but as a crane in good running condition and working order. I think this can be verified by Mr. Meyer Jackson and as soon as we have the crane as it will run we will send you the expense that we had on same in getting it to run.

Yours very truly,

Midland Iron & Steel Corp.
L. Livingston.

cc/ to Mr. Meyer Jackson.

The testimony of Louis Livingston is to the effect that he is not interested in appellant company, and not in the employ in any capacity, but that he does write an amount of business for appellant. He details his visits to appellee's yards in Chicago, where on the first trip, the price could not be agreed upon. He tells about his subsequent trip in October to appellee's yards, in company with Mr. Hackenbort, to look at the crane. He understood at that time that a gentleman by the name of Reinhart was interested in the purchase of the crane. He states that Reinhart wanted $2000 for it and that he told Reinhart that maybe he could interest appellant in the purchase of it, as he knew appellant was in the market for a crane. He offered Reinhart $1500, and they finally agreed upon a price of $1600. He states that at appellant's yards, he told Reinhart that before the deal was to be consummated satisfactorily he wanted to go to the yards of appellee and again see the crane. It was following this, that Livingston went to appellee's yards with Hackenbort, where the crane was demonstrated, and where they inspected and examined it, the deal made and the crane shipped as aforesaid.

Louis Livingston had been in the junk business for twenty or thirty years. He is the father or Irving Livinston, President of appellant company. He owned the yards now occupied by appellant company, and deeded the same to his son without any consideration. His son was associated with him in the business prior to the organization of appellant corporation. Louis Livingston makes his office at the office of appellant corporation. He states that he does business with old-time friends who know that he does business back and forth with the Midland, and that in addition to this, he deals with the International Harvester Company for things which he thinks the appellant can use, stating that he represents appellant company in such transactions. He says that the same day he bought this crane from appellee, he resold it to appellant. He further states that the business of appellant is transacted largely outside its office, that he sometimes acts as its agent, and that they frequently send him out to buy things. He further states that he was present when the officers of appellant were discussing the purchase of a crane; that he did not need a crane himself; that he discussed the matter of this crane with the officers of appellant corporation, before going to Chicago to inspect it; and that he discussed with the officers, Finkelstein, and his son Irving Livingston, the price they would pay for a crane. Only three people appear to be interested in appellant corporation, namely, Irving J. Livingston, son of Louis Livingston, I.J. Finkelstein and Leo Finkelstein. No one who admitted they were interested in appellant corporation, testified, except Irving Livingston. Louis Livingston states that when the price of $1600 was finally agreed upon, he told Feinberg he wanted to make another inspection of the crane before the deal should become final. It was after this that Livingston and Hackendorf, the mechanic, went to appellee's yards for an inspection and demonstration of the crane. Louis Livingston denied that he said anything to Feinberg about shipping him metals toward the payment of the crane. He is refuted in this by the above letter of November 26, 1934, written in response to appellee's demand for payment. In this letter, explana-

Louis Livingston had been in the junk business for twenty or thirty years. He is the father of Irving Livingston, President of appellant company. He owned the junk now acquired by appellant company, and deeded the same to his son without any consideration. His son was associated with him in the business prior to the organization of appellant corporation. Louis Livingston makes his office at the office of appellant corporation. He states that he does business with old-time friends who know that he does business here and forth with the Midland, and that in addition to this, he deals with the International Harvester Company for tools which it thinks the appellant can use, stating that he represents appellant company in such transactions. He says that the same day he bought this crane from appellee, he resold it to appellant. He further states that the business of appellant is transacted largely outside its office, that he sometimes acts as its agent, and that they frequently send him out to buy things. He further states that he was present when the officers of appellant were discussing the purchase of a crane; that he did not need a crane himself; that he discussed the matter of this crane with the officers of appellant corporation, before going to Chicago to interest him; and that he discussed with the officers, Fraenkeldt, and his son Irving Livingston, the price that would pay for a crane. Only three people appear to be interested in appellant corporation, namely, Irving L. Livingston, son of Louis Livingston, i.e. Fraenkeldt and Leo Fickelstein. No one who admitted they were interested in appellant corporation, testified, except Irving Livingston. Louis Livingston states that when the price of $1300 was finally agreed upon, he told Fraenkeldt he wanted to make another inspection of the crane before the deal should become final. It was after this that Livingston and Lefkowitz, the mechanic, went to appellee's yards for an inspection and demonstration of the crane. Louis Livingston denied that he said anything to Fraenkeldt about shipping his mother's tower the payment of the crane. He is refuted in this by the above letter of November 16, 1924, written in response to appellee's demand for payment. In this letter, explana-

tion is offered as to the delay in the shipment of the metals. Irving Livingston states that he signed this letter.

Appellee's employee, a hoisting engineer, was at the yards of appellee on the morning when Louis Livingston and Hackendorf came to inspect the crane. They talked to this witness about it. He states that he told Mr. Livingston it was not a new crane nor an old one; that it was worn, but just the thing for a scrap yard, with a generator and magnet, which it had; that they requested him to move the crane and demonstrate it, which he did. He states that he spent the morning, from about ten o'clock until in the afternoon - some four hours - demonstrating the crane to Livingston and Hackendorf. He says that he told them it was not an up to date type of crane, but an old type, steered hard, and would not perform certain named services that a modern type crane would do.

Louis Livingston was appellant's witness. He and his son Irving Livingston, President of appellant corporation, deny that any agency existed between appellant and Louis Livingston with respect to the purchase of this crane. However, from an examination of the record, the relationship of Louis Livingston to appellant is so involved that it was a proper question to be submitted to a jury. It appears that Louis Livingston and his son Irving, had been engaged in the same business as appellant, for many years, and that for a period of nine years Louis owned the yard now occupied by appellant; that about 1931 or 1932, he deeded this yard to his son Irving, receiving no consideration; that appellant corporation was organized with his son as President, and I.J. and Leo Finkelstein as the other parties interested. It further appears that since such time the father has made his office at the office of appellant, and he speaks in his testimony of acts of agency for appellant.

A principal is bound by the authority which he gives to his agent and by that which he by his own acts appears to give. Agency may be established by parol evidence, and circumstantial evidence is ordinarily competent to establish the fact or extent of such agency.

tion is offered as to the delay in the shipment of the pelts. Irving Livingston stated that he signed this letter.

Appellee's employee, a hoisting engineer, was at the yards of appellee on the morning when Louis Livingston and Backenhorf came to inspect the crane. They talked to this witness about it. He testified that he told Mr. Livingston it was not a very good one to pick one; that it was worn, but just the thing for a stump puller, with a generator and magnet, which it had; that they requested him to move the crane and demonstrate it, which he did. He stated that he spent the morning, from about ten o'clock until in the afternoon - some four hours - demonstrating the crane to Livingston and Backenhorf. He said that in his opinion it was not up to date type of crane, but an old type, shovel part, and would not perform certain hoisted services that a modern type crane would do.

Louis Livingston was appellant's witness. He and his son Irving Livingston, President of appellant corporation, deny that any agency existed between appellant and Louis Livingston with respect to the purchase of this crane. However, from an examination of the record, the relationship of Louis Livingston to appellant is so involved that it was a proper question to be submitted to a jury. It appears that Louis Livingston and his son Irving, had been engaged in the same business as appellant, for many years, and that for a period of nine years Louis owned the yard now occupied by appellant; that about 1921 or 1922, he deeded this yard to his son Irving, receiving no consideration; that appellant corporation was organized with his son as president, and L.J. and Leo Finkelstein as the other parties interested. It further appears that since such time the father has made his office at the office of appellant, and he works in his settlement of his affairs for appellant.

A principal is bound by the authority which he gives to his agent and or that which he by his own acts appears to give. Agency may be established by parol evidence, and circumstantial evidence is ordinarily competent to establish the fact or extent of such agency.

Faber-Musser Co. v. Dee Clay Co. 291 Ill. 240. The question as to whether a person is the agent of another or whether his unauthorized acts are later ratified, are questions of fact for a jury. Acts and circumstances by the principal may go to establish proof of agency, and even though an agent might be said not to have an express authority to act for a corporation, yet if he does so act, and such is not beyond the power of the corporation, it may ratify and approve the act, accept the benefits thereof, and become liable to the same extent as though it had conferred express authority upon the agent to do the thing. There is no dispute here but that Louis Livingston negotiated the purchase of this crane for the price of $1600. The question presented is, who is liable therefor. In this connection it has been said that reference may be had to the situation of the parties, their acts, and any other circumstances having legal bearing and throwing light on the question. Faber-Musser Co. v. Dee Clay Co. supra, p. 246.

The evidence in this record on the question of agency between appellant and Louis Livingston is of such a character as to warrant its submission to the jury. The points raised by appellant are confined to questions of fact, being directed toward the weight of the evidence, and the refusal of the court to grant its motion for directed verdict. In the state of the record, we do not feel disposed to disturb the verdict of the jury.

The additional abstract prepared and filed by appellee is considered proper and necessary, and the cost thereof is ordered taxed against appellant. The judgment herein is affirmed.

Judgment affirmed.

Faber-Musser Co. v. Ice Clay Co. 291 Ill. 240. The question as to whether a person is the agent of another or whether his unauthorized acts are later ratified, are questions of fact for a jury. Acts and circumstances by the principal may go to establish proof of agency, and even though an agent might be said not to have an express authority to act for a corporation, yet if he does so act, and such is not beyond the power of the corporation, it may ratify and approve the act, accept the benefits thereof, and become liable to the same extent as though it had conferred express authority upon the agent to do the thing. There is no dispute here but that Davis Livingston negotiated the purchase of this crane for the price of $[illegible]. The question presented is, who is liable therefor. In this connection it has been said that reference may be had to the situation of the parties, their acts, and any other circumstances having legal bearing and throwing light on the question. Faber-Musser Co. v. Ice Clay Co. supra, p. 245.

The evidence in this record on the question of agency between appellant and Davis Livingston is of such a character as to warrant its submission to the jury. The points raised by appellant are confined to questions of fact, being directed toward the weight of the evidence, and the refusal of the court to grant its motion for directed verdict. In the state of the record, we do not feel disposed to disturb the verdict of the jury.

The additional abstract prepared and filed by appellee is considered proper and necessary, and the cost thereof is ordered taxed against appellant. The judgment herein is affirmed.

Judgment affirmed.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32) 7

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 3rd day of May, in the year of our Lord one thousand nine hundred and thirty-eight, within and for the Second District of the State of Illinois:

Present -- The Hon. FRANKLIN R. DOVE, Presiding Justice
Hon. FRED G. WOLFE, Justice
Hon. BLAINE HUFFMAN, Justice
JUSTUS L. JOHNSON, Clerk
RALPH H. DESPER, Sheriff

BE IT REMEMBERED, that afterwards, to-wit: On JUN 22 1938 the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

Gen. No. 9327 Agenda No. 21.

In the Appellate Court of Illinois

Second District

May Term, A. D. 1938.

Rockford Finance and Thrift Company, a corporation,

Appellant,

vs.

Metropolitan Life Insurance Company, a corporation,

Appellee.

Appeal from the Circuit Court Winnebago County.

HUFFMAN - J.

Jeanette Westberg was the holder of a $250 policy in appellee company. The policy was one which is commonly designated as industrial insurance, payable in weekly premiums. Appellant made a loan of $100 to said Jeanette Westberg, and took as security for the loan an assignment from her of the above policy. When appellant notified appellee of this action, appellee informed appellant that it would not endorse a policy loan; that there was no provision in such policy for loans by the company, and further, that they specifically provided against assignments as security for loans by others.

Jeanette Westberg, by the terms of her loan contract with appellant, was to repay the loan at the rate of $10 per month. She became in default, whereupon appellant demanded that appellee pay to it as assignee of the policy, the sum of $130.70, which was the cash value thereof. This, appellee refused to do, and the appellant brought suit in the Justice of the Peace court, where a judgment was recovered against appellee. Appeal was prosecuted from this judgment by the insurance company, to the Circuit Court of Winnebago County, whereupon a stipulation of facts, the Circuit Court entered judgment for appellee. It

Gen. No. 9327 Agenda No. 21.

In the Appellate Court of Illinois

Second District

May Term, A. D. 1916.

Rockford Finance and Thrift
Company, a corporation,
Appellant,

vs.

Metropolitan Life Insurance
Company, a corporation,
Appellee.

Appeal from the Circuit Court
Winnebago County.

HUFFMAN - 1.

Jennette Westberg was the holder of a $250 policy in appellee company. The policy was one which is commonly designated as industrial insurance, payable in weekly premiums. Appellant made a loan of $100 to said Jennette Westberg, and took as security for the loan an assignment from her of the above policy. When appellant notified appellee of this action, appellee informed appellant that it would not endorse a policy loan; that there was no provision in such policy for loans by the company, and further, that they specifically provided against assignments as security for loans by others.

Jennette Westberg, by the terms of her loan contract with appellant, was to repay the loan at the rate of $10 per month. She became in default, whereupon appellant demanded that appellee pay to it as assignee of the policy, the sum of $150.00, which was the cash value thereof. This, appellee refused to do, and the appellant brought suit in the Justice of the Peace court, where a judgment was recovered against appellee. Appeal was prosecuted from this judgment by the insurance company, to the Circuit Court of Winnebago County, where, upon a stipulation of facts, the Circuit Court entered judgment for appellee. It

is from this judgment the appeal herein is prosecuted.

The appellant sets out no errors relied upon for reversal. Under such circumstances there is nothing presented to this court for review. It has long been the rule that a case submitted to a court of review for final decision, without an assignment of errors, will be dismissed. Farmer's State Bank v. Meyers, 282 Ill. App. 549; Gyure v. Sloan Valve Co., 367 Ill. 489. This appeal is therefore dismissed.

Appeal dismissed.

is from this judgment the appeal herein is prosecuted.

The appellant sets out no errors relied upon for reversal. Under such circumstances there is nothing presented to this court for review. It has long been the rule that a case submitted to a court of review for final decision, without an assignment of errors, will be dismissed. Farmer's State Bank v. Meyers, 282 Ill. App. 349; Dyers v. Sloan Valve Co., 327 Ill. 479. This appeal is therefore dismissed.

Appeal dismissed.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32) 7

9222

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 3rd day of May, in the year of our Lord one thousand nine hundred and thirty-eight, within and for the Second District of the State of Illinois:

Present -- The Hon. FRANKLIN R. DOVE, Presiding Justice
Hon. FRED G. WOLFE, Justice
Hon. BLAINE HUFFMAN, Justice
JUSTUS L. JOHNSON, Clerk
RALPH H. DESPER, Sheriff

296 I.A. 649[2]

BE IT REMEMBERED, that afterwards, to-wit: On AUG 16 1938 the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

9322

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 3rd day of May, in the year of our Lord one thousand nine hundred and thirty-eight, within and for the Second District of the State of Illinois:

Present -- The Hon. FRANKLIN R. DOVE, Presiding Justice
Hon. FRED G. WOLFE, Justice
Hon. BLAINE HUFFMAN, Justice
JUSTUS L. JOHNSON, Clerk
RALPH H. DESPER, Sheriff

296 I.A. 649[2]

BE IT REMEMBERED, that afterwards, to-wit: On AUG 16 1938 the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

Gen. No. 9322 Agenda No. 32

In the Appellate of Illinois

Second District

May Term, A. D. 1938.

59A

Hugo Pick, as Trustee,

Appellee,

vs.

Elizabeth Druggan,

Appellant.

Appeal from the Circuit Court of Lake County

DOVE, P. J.

On October 19, 1923 Hugo Pick and Elizabeth Druggan entered into a contract by the provisions of which Pick agreed to sell and Mrs. Druggan agreed to buy the two hundred and forty acre farm involved in this proceeding and pursuant to that agreement Mrs. Druggan went into possession of the farm. On April 17, 1936, some litigation between the parties concerning this contract was pending and on that day, in order to settle that litigation, a supplemental agreement was entered into, the provisions of which are not material here and need not be set out. On July 19, 1936 Mrs. Druggan, having failed to meet the required payments as provided in said supplemental contract, a forcible entry and detainer suit was instituted against Mrs. Druggan to recover possession of the premises. On August 17, 1936, the parties settled their differences and on that day Herbert Decker, an attorney representing Mr. Pick, prepared a purchase money trust deed, principal note and interest coupons and these were duly executed by Mrs. Druggan. The note was for the principal sum of $24,500.00, is dated August 17, 1936 and was to become due April 17, 1940. The stipulated interest was 5% per annum from April 17, 1936, payable semi-annually and was evidenced by coupon interest notes, each for $612.50, the first one becoming due on October 17, 1936.

Gen. No. 5323 Agenda No. 32

In the Appellate Court of Illinois

Second District

May Term, A. D. 1939.

Hugo Tick, as Trustee,

Appellee,

vs.

Elizabeth Trugen,

Appellant.

Appeal from the Circuit Court of Lake County

DOVE, P. J.

On October 19, 1923 Hugo Tick and Elizabeth Trugen entered into a contract by the provisions of which Tick agreed to sell and Mrs. Trugen agreed to buy the two hundred and forty acre farm involved in this proceeding and pursuant to that agreement Mrs. Trugen went into possession of the farm. On April 17, 1936, some litigation between the parties concerning this contract was pending and on that day, in order to settle that litigation, a supplemental agreement was entered into, the provisions of which are not material here and need not be set out. On July 19, 1936 Mrs. Trugen, having failed to meet the required payments as provided in said supplemental contract, a forcible entry and detainer suit was instituted against Mrs. Trugen to recover possession of the premises. On August 17, 1936, the parties settled their differences and on that day Herbert Dopler, as attorney representing Mr. Tick, prepared a purchase money trust deed, principal note and interest coupons and these were duly executed by Mrs. Trugen. The note was for the principal sum of $24,000.00, is dated August 17, 1936 and was to become due April 17, 1940. The stipulated interest was 5% per annum from April 17, 1936, payable semi-annually and was evidenced by coupon interest notes, each for $612.50, the first one becoming due on October 19, 1936.

Both the note and trust deed provided that in case of default for three days in making payment of said interest notes or any installment due in accordance with the terms thereof, either of principal or interest, that then the whole of said principal sum should at once, at the option of the holder of said note, become immediately due and payable.

In some of these transactions Mrs. Druggan was represented by her agent Harold Hayes and Hugo Pick was represented by his said attorney Herbert Decker. After the trust deed and notes were prepared by Decker on August 17, 1936, they were delivered to Hayes, who procured them to be executed by Mrs. Druggan and on September 8, 1936 they were returned to Decker, who delivered them to the Chicago Title and Trust Company and ordered a continuation of the title policy and they subsequently came into possession of Decker, who held them for and on behalf of Mr. Pick and subject to his, Pick's, orders. The interest, amounting to $612.50, which became due on October 17, 1936, was not paid and on November 3rd, 1936, Decker at the request of Pick wrote Mrs. Druggan as follows: "In re: First Mortgage Trust deed secured by property in Lake County. This is to advise you that semi-annual interest amounting to $612.50 was due on October 17, 1936 and no part thereof has been paid. Your representative, Mr. Hays, called at our office last week and promised that this interest would be paid on Monday, November 2, 1936, but default was made in the payment thereof. Therefore, on behalf of the owner of the trust deed and notes, we advise you that he has declared the entire principal sum of $24,500.00, together with accrued interest, immediately due and payable and has authorized us to institute foreclosure proceedings immediately. You may govern yourself accordingly". Decker testified that a carbon copy of this letter was mailed to Hayes and the letter so indicates. Hayes denied, however, that he received it but Mrs. Druggan received the original in due course of mail.

both the note and trust deed provided that in case of default for three days in making payment of said interest notes or any installment due in accordance with the same statement, either of principal or interest, that then the whole of said principal sum should at once, at the option of the holder of said note, become immediately due and payable.

In some of these transactions Mrs. Duggan was represented by her agent Harold Hayes and Tago Fick was represented by his said attorney Herbert Decker. After the trust deed and notes were prepared by Decker on August 17, 1926, they were delivered to Hayes, who procured them to be executed by Mrs. Duggan and on September 3, 1926 they were returned to Decker, who delivered them to the Illinois Title and Trust Company and ordered a continuation of the title policy and they subsequently came into possession of Decker, who held them for and on behalf of Mr. Fick and subject to his, Fick's, orders. The interest, amounting to $216.50, which became due on October 17, 1926, was not paid and on November 3rd, 1926, under at the request of Fick wrote Mrs. Duggan as follows: "In yet first mortgage trust deed secured by property in Cook County. This is to advise you that semi-annual interest amounting to $216.50 was due on October 17, 1926 and no part thereof has been paid. Your representative, Mr. Hayes, called at our office last week and promised that this interest would be paid on Monday, November 2, 1926, but default and delay in the payment thereof. Therefore, on behalf of the owner of the trust deed and notes, we advise you that he has declared the entire principal sum of $24,500.00, together with accrued interest, immediately due and payable and has authorized us to institute foreclosure proceedings immediately. You may govern yourself accordingly". Decker testified that a carbon copy of this letter was mailed to Hayes and the letter so indicates. Hayes denied, however, that he received it but Mrs. Duggan received the original in due course of mail.

On November 12, 1936 the instant complaint to foreclose this trust deed was filed. The answer of the defendant admitted the execution and delivery of the notes and trust deed but denied that a default existed. The answer denied the right of the plaintiff to declare the principal sum due, and denied that the plaintiff had a right to foreclose and averred that the plaintiff had waived the default for non-payment of Coupon No. 1 at the time specified. The cause was referred to a SpecialMaster, who took the testimony and among other things found that: "it would be inequitable and an unjust hardship to require defendant to pay the entire amount of principal and interest because of such comparatively small default in these days of only partial recovery from a disastrous depression". The Special Master recommended that an order be entered granting defendants five days to pay the interest and that upon such payment being made that a further order then be entered dismissing the cause for want of equity. The Chancellor sustained exceptions to this report and rendered the usual decree of foreclosure and sale and the defendant Elizabeth Druggan appeals.

In addition to the foregoing facts, Harold Hayes testified that he came to Decker's office on either the 15th, 16th or 17th of October, 1936 and there had a conversation with Decker and told him that Mrs. Druggan was ready to pay the $612.50 interest on the principal note; that Decker told him that he was waiting for a title guaranty policy to come from the Chicago Title and Trust Company and that when it arrived, he, Decker, would notify Hayes. Mr. Hayes further testified that on October 27th or 28th Decker 'phoned Hayes advising him that the policy was at his office and Hayes went to Decker's office and Decker there told him that he was now ready to accept the interest; that Hayes then asked Decker if the first of the month would be satisfactory and Decker said it would. Mr. Decker testified that Hayes was not at his office on either the 15th, 16th or 17th of October, 1936 nor at

On December 14, 1934 the instant complaint to foreclose this trust deed was filed. The answer of the defendant admitted the execution and delivery of the notes and trust deed but denied that a default existed. The answer denied the right of the plaintiff to declare the principal sum due, and denied that the plaintiff had a right to foreclose and averred that the plaintiff had waived the default for non-payment of coupon No. 1 at the time specified. The cause was referred to a Special Master, who took the testimony and among other things found that: "It would be inequitable and an unjust burdenship to require defendant to pay the entire amount of principal and interest because of such comparatively small default in three days or only partial recovery from a disastrous depression". The Special Master recommended that an order be entered granting defendants five days to pay the interest and that upon such payment being made that a further order then be entered dismissing the cause for want of equity. The Chancellor sustained exceptions to this report and rendered the usual decree of foreclosure and sale and the defendant Elizabeth Dreyfus appeals.

In addition to the foregoing facts, Harold Hayes testified that he came to Decker's office on either the 16th, 18th or 17th of October, 1934 and there had a conversation with Decker and told him that Mrs. Dreyfus was ready to pay the $21.50 interest on the principal note; that Decker told him that he was waiting for a title guaranty policy to come from the Chicago Title and Trust Company and that when it arrived, he, Decker, would notify Hayes. Mr. Hayes further testified that on October 27th or 28th Decker 'phoned Hayes advising him that the policy was at his office and Hayes went to Decker's office and Decker there told him that he was now ready to accept the interest; that Hayes then asked Decker if the first of the month would be satisfactory and Decker said it would. Mr. Decker testified that Hayes was not at his office on either the 16th, 18th or 17th of October, 1934 nor at

any other time up to October 27th, 1936, but that he was there on that day at which time Decker delivered to him the guaranty policy and Hayes there stated to him that Mrs. Druggan would get the money for the interest from the Gambrinus Company and that he, Hayes, would see that the interest was paid on November 2, 1936. According to Decker's testimony, he, Decker, then said to Hayes that he would take this up with Mr. Pick but did not know what he would say. According to the testimony of Mr. Hayes he, Hayes, called at Decker's office on November 4th, 1936 after Mrs. Druggan had received Decker's letter of November 3rd, 1936 and after Mrs. Druggan had so advised Hayes of the contents of said letter, and in the conversation that took place there, Decker told Hayes that in addition to the interest amounting to $612.50 that he, Decker, insisted upon receiving a $500.00 attorney fee. Hayes further testified that the next time he saw Decker about the matter might have been on either November 7th or 8th and that subsequently he had many conversations with him. Decker testified positively that Hayes did not come to his office nor did he have any conversation with him on November 4, 1936 nor was there any discussion with him or any one else regarding the payment of interest between October 27th and November 12, 1936, the day on which the instant complaint was filed. According to Decker, the first time after October 27th that he talked to Hayes was on December 3, 1936 and at that time an attorney fee of $500.00 was spoken of as the complaint had then been filed.

The record further discloses that Herbert Decker is a member of the firm of Decker, Golden and Perlman, attorneys with offices in Chicago, and that this firm represented appellee from November 2, 1936, at which time the letter hereinbefore referred to was sent to appellant by appellee, to April 8th 1937. That this firm prepared the instant complaint and retained, at the time the complaint was filed, the firm of Decker, Brazell and Decker, attorneys with offices in Waukegan, as associate counsel. The record further discloses that Bernard M.Decker

any other time up to October 27th, 1936, but that he was there on that day at which time Decker delivered to him the guaranty policy and Hayes there stated to him that Mr. Trugman would get the money for the interest from the Gambrinus Company and that he, Hayes, would see that the interest was paid on November 2, 1936. According to Decker's testimony, he, Decker, then said to Hayes that he would talk this up with Mr. Tick but did not know what he would say. According to the testimony of Mr. Hayes he, Hayes, called at Decker's office on November 4th, 1936 after Mr. Trugman had received Decker's letter of November 3rd, 1936 and after Mr. Trugman had so stated Hayes of the contents of said letter, and in the conversation that took place then, Decker told Hayes that in addition to the interest amounting to $414.00 that he, Decker, insisted upon receiving a $400.00 attorney fee. Hayes further testified that the next time he saw Decker about the matter might have been on either November 7th or 8th and that subsequently he had many conversations with him. Decker testified positively that Hayes did not come to his office nor did he have any conversation with him on November 4, 1936 nor was there any discussion with him or any one else regarding the payment of interest between October 27th and November 12, 1936, the day on which the instant complaint was filed. According to Decker, the first time after October 27th that he talked to Hayes was on December 3, 1936 and at that time an attorney fee of $400.00 was spoken of and the complaint had then been filed.

The record further discloses that Herbert Decker is a member of the firm of Decker, Dolan and Jordan, attorneys with offices in Chicago, and that this firm represented appellee from November 4, 1936, at which time the latter hereinbefore referred to was sent to appellant by appellee, to April 8th 1937. That this firm prepared the instant complaint and retained, at the time the complaint was filed, the firm of Decker, Brandt and Decker, attorneys with offices in Kankakee, as associate counsel. The record further discloses that Herbert A.Decker

of the Waukegan firm received the complaint from the Chicago firm, signed the same on behalf of his firm and filed it, secured the summons, prepared the publication notice, ordered the publication to be made, checked the service and files and appeared in the Circuit Court at various times and prepared the order of default and reference and he also appeared before the Special Master on all hearings. The record further discloses that Herbert Decker at the first hearing before the Special Master introduced the trust deed, note and interest coupons and rested the plaintiff's case. This was on March 6, 1937. At the next hearing on March 23, 1937, Harold Hayes testified and at the further hearings on April 2nd, 13th and 27th Bernard M. Decker of the Waukegan firm appeared for and represented appellee. On April 8, 1937, the firm of Decker, Golden and Perlman withdrew as attorneys for appellee and David L. Golden and Milton Perlman, members of said firm, were substituted as such attorneys.

Counsel for appellant argue that Herbert Decker's testimony is not only highly improbable but that he was until April 8th, 1937 one of the attorneys for appellee and therefore a financially interested witness and his entire testimony should be discredited. We have read much of the testimony in this case from the record itself. Mr. Decker's testimony does not impress us as highly improbable or unworthy of belief. Conceding, however, that Mr. Hayes is correct when he says that he was in Mr. Decker's office on either the 15th, 16th or 17th of October, 1936 and that he, Hayes, then told Decker that appellant was ready to pay the $612.50 interest then past due and conceding that on October 27, 1936 these parties were again in Decker's office and that Decker then said he was ready to receive the interest and Hayes requested him to wait until the first of November and Decker said he would, the facts are that Mr. Decker did wait until November 3, 1936 and at that time no interest had been paid nor had any tender of any interest been made. The letter of that date fixed the rights of the parties as of that date. The interest had then been due since October 17th. Under the provisions of the note and trust deed appellee had at that time a

of the Dunkerque firm received the complaint from the Chicago firm, signed the same on behalf of his firm and filed it, secured the summons, prepared the publication notice, ordered the publication to be made, obtained the service and files and appeared in the District Court at various times and prepared the order of default and reference and he also appeared before the special Master on all hearings. The record further discloses that Herbert Decker at the first hearing before the Special Master introduced the trust deed, note and interest coupons and rested the plaintiff's case. This was on March 6, 1926. At the next hearing on March 26, 1927, Harold Boyce testified and at the further hearings on April 2nd, 13th and 27th Bernard E. Dwyer of the Dunkerque firm appeared for and represented appellee. On April 6, 1927, the firm of Decker, Golden and Perlman entered as attorneys for appellee and David I. Golden and Milton Perlman, members of said firm, were substituted as such attorneys.

Counsel for appellant argue that Herbert Decker's testimony is not only highly improbable but that he was until April 2nd, 1927 one of the attorneys for appellee and therefore a financially interested witness and his entire testimony should be discredited. We have read much of the testimony in this case from the record itself. Mr. Decker's testimony does not impress us as highly improbable or unworthy of belief. Conceding, however, that Mr. Boyce is correct when he says that he was in Mr. Decker's office on either the 12th, 16th or 17th of October, 1926 and that he, Boyce, then told Decker that appellant was ready to pay the $615.50 interest then past due and announce that on October 27, 1926 these parties met again in Decker's office and that Decker then said he was ready to receive the interest and Boyce requested him to wait until the first of November and Decker said he would, the fact are that Mr. Decker did wait until November 2, 1926 and at that time no interest had been paid nor had any tender of any interest been made. The letter of that date fixed the rights of the parties as of that date. The interest had then been due since October 17th. Under the provisions of the note and trust deed Boyce had at that time a

right to elect to declare the principal sum due. By the unequivocal terms of tha letter he did so. There is no pretense that any tender of the principal sum and accrued interest was ever made after November 3, 1936 and in fact the evidence falls far short of showing a tender of any amount at any time. All that Mr. Hayes says is that on October 15th, 16th or 17th, appellant was ready to pay the interest but no offer was made to do so. All that Mr. Hayes says took place on October 27th with reference to the payment of interest was that when Mr. Decker said he was ready to receive the interest at that time Mr. Hayes then asked him if it would not be satisfactory to wait until the first of the month and that Mr. Decker said it would be. If such conversation took place the words, "the first of the month" were not used in the sense that they should be understood as referring to the very first day of November but Mr. Decker's version of this conversation is that Hayes stated positively that he would see to it that appellant paid the interest by November 2, 1936 and to this statement he, Decker, replied that he would take it up with appellee but did not know what he would say about it. It seems to us that the letter of Mr. Decker dated November 3rd, 1937 is in harmony with his testimony.

In Curran v. Houston, 201 Ill. 442 our Supreme Court said: "Parties may by contract make the time, given for payment of the principal debt, depend upon the prompt payment of the several installments of interest when due, providing, either in the note, or mortgage securing the same, that a failure to make payment of any installment of interest shall work a forfeiture of the credit, and make the entire debt due at once. Such stipulation, that the whole sum shall become due and payable upon default in the payment of the principal or interest is universally held to be legal and valid. It is not objectionable as being in the nature of a penalty or forfeiture, but will be sustained in equity as well as at law (Hoodless v. Redit, 112 Ill. 105; 1 Jones on Mortgages,--5th ed.--sec. 76; 1 Pomeroy's Eq. Jur. sec. 439; Kramer v. Rebman, 9 Iowa, 114, Ottawa Northern Plank Road Co. v. Murray, 15 Ill. 336)"

right to elect to declare the principal due. By the unmodified terms of the letter he did so. There is no evidence that any payment of the principal was and accrued interest was ever made after November 3, 1936 and in fact the evidence tells far short of showing a tender of any amount at any time. All that Mr. Hayes says is that on October 15th, 16th or 17th, appellant was ready to pay the interest but no offer was made to do so. All that Mr. Hayes says took place on October 17th with reference to the payment of interest was that when Mr. Decker said he was ready to receive the interest at that time Mr. Hayes then asked him if it would not be satisfactory to wait until the first of the month and that Mr. Decker said it would be. If such conversation took place the words, "the first of the month" were not used in the sense that they should be understood as referring to the very first day of November but Mr. Decker's version of this conversation is that Hayes stated positively that he would see to it that appellant paid the interest by November 4, 1936 and to this statement he, Decker, replied that he would take it up with appellee but did not know what he would say about it. It seems to us that the letter of Mr. Decker dated November 3rd, 1937 is in harmony with his testimony.

In Curtis v. Meaden, 201 Ill. 464 the Supreme Court said:

Parties may by contract make the time, given for payment of the principal debt, depend upon the prompt payment of the several instalments of interest when due, providing, either in the note, or mortgage securing the same, that a failure to make payment of any instalment of interest shall work a forfeiture of the credit, and make the entire debt due at once. Such stipulation, that the whole sum shall become due and payable upon default in the payment of the principal or interest is universally held to be legal and valid. It is not objectionable as being in the nature of a penalty or forfeiture, but will be sustained in equity as well as at law (Goodlove v. Dodd, 112 Ill. 102; 1 Jones on Mortgages,--5th ed.--sec. 76; 1 Pomeroy's Eq. Jur. sec. 439; Kramer v. Palmer, 9 Iowa, 114, Ottawa Northern Plank Road Co. v. Murray, 15 Ill. 336)"

In Meyer v. Levy, 249 Ill. App. 408 in enforcing the acceleration provisions of a large mortgage involving peculiar hardship upon the mortgagors, the court, at page 422, said: "It is the duty of a court of equity to enforce the contract made by the parties and not to depart therefrom, unless good and sufficient reason clearly appears from the proofs for so doing". In a chancery proceeding, the facts are found by the court as a basis of the decree and the special master's report, while prima facie correct, is of an advisory nature only. All the facts are open for consideration by the Chancellor and a court of review. Mallinger v. Shapiro, 329 Ill. 629 at page 633. In the instant case, it appears from the record that the Chancellor took the cause under advisement and when he disposed of the case he filed a written opinion which discloses that he painstakingly considered and carefully reviewed all the evidence submitted before the Special Master, and in our opinion he, the Chancellor, and not the Special Master correctly interpreted the testimony. The decree is supported by the credible evidence found in the record and it will therefore be affirmed.

DECREE AFFIRMED.

In Meyer v. Levy, 245 Ill. App. 408 in enforcing the acceleration provisions of a large mortgage involving peculiar hardship upon the mortgagors, the court, at page 422, said: "It is the duty of a court of equity to enforce the contract made by the parties and not to depart therefrom, unless good and sufficient reason clearly appears from the proofs for so doing". In a chancery proceeding, the facts are found by the court or a Master of the degree and the special Master's report, while prima facie correct, is of an advisory nature only. All the facts are open for consideration by the Chancellor and a court of review. Hallinger v. Shapiro, 320 Ill. 629 at page 632. In the instant case, it appears from the record that the Chancellor took the cause under advisement and when he disposed of the case he filed a written opinion which discloses that he painstakingly considered and carefully reviewed all the evidence submitted before the special Master, and in our opinion he, the Chancellor, and not the Special Master correctly interpreted the testimony. The decree is supported by the credible evidence found in the record and it will therefore be affirmed.

DECREE AFFIRMED.

STATE OF ILLINOIS,
SECOND DISTRICT } SS.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32) 7

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 3rd day of May, in the year of our Lord one thousand nine hundred and thirty-eight, within and for the Second District of the State of Illinois:

Present -- The Hon. FRANKLIN R. DOVE, Presiding Justice
Hon. FRED G. WOLFE, Justice
Hon. BLAINE HUFFMAN, Justice
JUSTUS L. JOHNSON, Clerk
RALPH H. DESPER, Sheriff

296 I.A. 649[3]

BE IT REMEMBERED, that afterwards, to-wit: On AUG 16 19[illegible] the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

GEN. NO. 9334 AGENDA NO. 27

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

May Term, A. D. 1938.

Laura Farnham,
Appellee

vs.

E.F. Swartwout,
Appellant,

and

Edgar Dolder,
Appellee

vs.

E.F. Swartwout,
Appellant.

Appeal from the County Court of LaSalle County.

DOVE, P.J.

On November 12, 1937, the County Court of LaSalle County rendered judgment by confession, in favor of E.F. Swartwout and against Frank Dolder and Eliza Dolder for $1262.82, upon a note executed by them on March 1, 1917, and upon which interest had been paid in 1931. An execution was issued upon this judgment and on November 29, 1937, the Sheriff levied upon six head of cows and heifers, one team of work horses, sixteen hundred bushels of corn, two hundred bushels of oats, four tons of alfalfa hay in stack and eight tons in barn, Easy Way hay loader, side delivery rake, tractor double disc, Minneapolis Moline tractor, corn elevator, gasoline engine, McCormick No. 8 combine, Bradley mower, manure spreader, harrow, 2 bottom tractor plow, binder, and tractor corn cultivator, as the property of Frank V. Dolder.

Laura Farnham claimed to be the owner of the six head of cows and heifers and the team of work horses levied upon, and Edgar Dolder claimed to be the owner of the remainder of the property and each gave the required statutory notice to the Sheriff to this effect. A trial of the rights of property was thereupon had under the statute, which resulted in a finding that the claimants were

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

May Term, A. D. 1932.

Laura Farnham,
Appellee,

vs.

E.F. Swartwout,
Appellant,

and

Edgar Dolder,
Appellee

vs.

E.F. Swartwout,
Appellant.

Appeal from the County
Court of Lasalle County.

DOVE, P.J.

On November 12, 1927, the County Court of Lasalle County rendered judgment by confession, in favor of E.F. Swartwout and against Frank Dolder and Ellis Dolder for $1232.75, upon a note executed by them on March 1, 1917, and upon which interest had been paid in 1921. An execution was issued upon this judgment and on November 29, 1927, the Sheriff levied upon six head of cows and heifers, one team of work horses, sixteen hundred bushels of corn, two hundred bushels of oats, four tons of alfalfa hay in stack and eight tons in barn, Hay Tay hay loader, side delivery rake, tractor double disc, Minneapolis Moline tractor, corn elevator, gasoline engine, McCormick No. 3 combine, Grafley mower, manure spreader, harrow, 2 bottom tractor plow, binder, and tractor corn cultivator, as the property of Frank V. Dolder.

Laura Farnham claimed to be the owner of the six head of cows and heifers and the team of work horses levied upon, and Edgar Dolder claimed to be the owner of the remainder of the property and each gave the required statutory notice to the Sheriff to this effect. A trial of the rights of property was thereupon had under the statute, which resulted in a finding that the claimants were

the respective owners of the property levied upon and an order was entered directing the sheriff to return said property to them and the costs of the hearing were taxed against E.F. Swartwout. From this order and judgment Swartwout prosecutes this appeal.

The evidence discloses that Frank V. Dolder and Grace Dolder are husband and wife, that Edgar Dolder is their son, that Laura Farnham is the sister of Frank V. Dolder and Eliza Dolder is the mother of Frank Dolder and Laura Farnham. In the summer of 1931 and for some time prior thereto, Laura Farnham, Frank Dolder, their mother Eliza Dolder and another sister of Frank and Laura owned a farm of approximately one hundred thirty acres in Serena Township, LaSalle County, upon which Eugene Middleton lived as a tenant. Laura Farnham had charge of the renting of this farm and in August, 1931 talked to Edgar, her nephew, about renting the farm to him. Laura and her mother Eliza Dolder lived together and the intention at that time was for them to move on the farm the following Spring and Edgar would farm it. Edgar, at this time, was seventeen years of age. He had no money or anything with which to farm. Middleton, the tenant, moved off and Edgar went out to the farm to live about the first of March, 1932. Frank Dolder, the father of Edgar Dolder, was at that time living in Ottawa and had been, for the preceding seven years, engaged in the garage business in that city. He testified that his garage business was unsuccessful, that his health failed and that in the Spring of 1932 all he owned was his interest in the farm, which he shortly thereafter disposed of, and a little personal property consisting of automobile accessories and supplies of the value of a few hundred dollars. Shortly after his son Edgar went to the farm, he and his wife moved out there where they all lived since that time.

Laura Farnham testified that she rented the farm to Edgar Dolder and not to her brother, that it was agreeable with her for her brother and his wife to live on the farm with Edgar and keep house for him. There was no written lease entered into but all the testimony is to the effect that he, Edgar Dolder, was to deliver one-half of the crops

the respective owners of the property levied upon and an order was entered directing the sheriff to return said property to them and the costs of the hearing were taxed against H.T. Dartmout. From this order and judgment Dartmout prosecutes this appeal.

The evidence discloses that Frank V. Dolder and Grace Dolder are husband and wife, that Edgar Dolder is their son, that Laura Farnham is the sister of Frank V. Dolder and Eliza Dolder is the mother of Frank Dolder and Laura Farnham. In the summer of 1931 and for some time prior thereto, Laura Farnham, Frank Dolder, their mother Eliza Dolder and another sister of Frank and Laura owned a farm of approximately one hundred thirty acres in Seven Township, Lasalle County, upon which Eugene Middleton lived as a tenant. Laura Farnham had charge of the renting of this farm and in August, 1931 talked to Edgar, her nephew, about renting the farm to him. Laura and her mother Eliza Dolder lived together and the intention at that time was for them to move on the farm the following Spring and Edgar would farm it. Edgar, at this time, was seventeen years of age. He had no money or anything with which to farm. Middleton, the tenant, moved off and Edgar went out to the farm to live about the first of March, 1932. Frank Dolder, the father of Edgar Dolder, was at that time living in Ottawa and had been, for the preceding seven years, engaged in the garage business in that city. He testified that his garage business was unsuccessful, that his health failed and that in the Spring of 1932 all he owned was his interest in the farm, which he shortly thereafter disposed of, and a little personal property consisting of automobile accessories and supplies of the value of a few hundred dollars. Shortly after his son Edgar went to the farm, he and his wife moved out there where they all lived since that time.

Laura Farnham testified that she rented the farm to Edgar Dolder and not to her brother, that it was agreeable with her for her brother and his wife to live on the farm with Edgar and keep horses for him. There was no written lease entered into but all the testimony is to the effect that he, Edgar Dolder, was to deliver one-half of the crops

raised on the premises to Laura Farnham as rent. Mrs. Farnham testified he was not to pay anything for the hay land or for about twelve acres of timbered pasture, but Edgar testified that the previous tenant had paid five dollars an acre for the hay land and $25.00 for the timbered pasture, and he expected to pay the same but had not been able to do so. On February 16, 1932 Frank Dolder attended a farm sale and purchased three cows, but the evidence is that he did so at the request of Mrs. Farnham and she furnished the money therefor. A few weeks later, in March 1932, she also purchased a team of horses and harness, which were taken to the farm, and these, with a few farm implements, constituted the equipment and livestock with which Edgar or his father started to farm in the Spring of 1932. During the ensuing five years one of the horses was sold and another purchased, the cows had calves and the heifers levied upon are offspring of the original cows purchased by Laura Farnham, but the three original cows have been replaced by others. The evidence further discloses that Frank Dolder, the father, attended several farm sales during the Spring of 1932 and purchased various articles of farming equipment but he testified that he purchased them for and on behalf of his son, Edgar Dolder, and his testimony was corroborated by Edgar. The evidence, however, does not disclose who paid for them. Edgar attained his majority on August 5, 1935 and the evidence is that the farm was conducted thereafter the same as before. Edgar did most of the farm work as the father was "poorly" as one witness testified, and suffered with rheumatism and a back ailment. In the Summer of 1936 the Easy Way hay loader and side delivery rake involved herein were purchased from George Nelson by Edgar, who paid $20.00 cash therefor and executed with his mother his note for the balance of the purchase price. In the Spring of 1935 Edgar purchased the tractor double disc and the Minneapolis Moline Tractor, which were levied upon, from the said George Nelson and paid Fifty Dollars cash to Nelson on one occasion and at another time paid $140.65, and the balance of $645.00 was evidenced by notes signed by Edgar and his mother and

raised on the premises to Laura Furnham as rent. Mrs. Furnham testified he was not to pay anything for the hay land or for about twelve acres of timbered pasture, but Edgar testified that the previous tenant had paid five dollars an acre for the hay land and $25.00 for the timbered pasture, and he expected to pay the same but had not been able to do so. On February 15, 1932 Frank Dolder attended a farm sale and purchased three cows, but the evidence is that he did so at the request of Mrs. Furnham and she furnished the money therefor. A few weeks later, in March 1932, she also purchased a team of horses and harness, which were taken to the farm, and these, with a few farm implements, constituted the equipment and livestock with which Edgar or his father started to farm in the Spring of 1932. During the ensuing five years one of the horses was sold and another purchased, the cows had calves and the heifers levied upon are offspring of the original cows purchased by Laura Furnham, but the three original cows have been replaced by others. The evidence further discloses that Frank Dolder, the father, attended several farm sales during the Spring of 1932 and purchased various articles of farming equipment but he testified that he purchased them for and on behalf of his son, Edgar Dolder, and his testimony was corroborated by Edgar. The evidence, however, does not disclose who paid for them. Edgar attained his majority on August 5, 1935 and the evidence is that the farm was conducted thereafter the same as before. Edgar did most of the farm work as the father was "poorly" as one witness testified, and suffered with rheumatism and a back ailment. In the Summer of 1936 the Hay Hay hay loader and side delivery rake involved herein were purchased from George Nelson by Edgar, who paid $20.00 cash therefor and executed with his mother his note for the balance of the purchase price. In the Spring of 1935 Edgar purchased the tractor double disc and the Minneapolis Moline Tractor, which were levied upon, from the said George Nelson and paid Fifty Dollars cash to Nelson on one occasion and at another time paid $140.65, and the balance of $642.00 was evidenced by notes signed by Edgar and his mother and

their payment was secured by a chattel mortgage. Edgar testified and it was not contradicted that he paid these notes when they became due. He also testified, without contradiction, that the corn elevator and gasoline engine levied on formerly belonged to the grandfather of Edgar but who in the Fall of 1932 gave them to Edgar, who repaired them, and they have been on the farm since then. The McCormick Deering No. 8 Combine, involved herein, was purchased by Edgar from George Bernard on October 22, 1937 and an instrument so showing was offered and admitted in evidence. It further appears that in the Spring of 1936 Edgar purchased the harrow from George Nelson for Fifty Dollars and that he paid one-half of the purchase price and gave his note for the balance, which note was signed by himself and his mother Grace Dolder. The two bottom tractor plow was purchased by Edgar in 1935, the binder was bought by Edgar in the Summer of 1937 from Betz and Grandgeorge and in the same Summer he purchased the tractor corn cultivator from George Nelson, paying Fifty Dollars down and giving his note which was also signed by his mother for the balance of the purchase price.

Edgar Dolder and his father both testified that the father had no interest in the personal property involved herein and they and Mrs. Farnham all testified that the cows, heifers and horses claimed by Mrs. Farnham belonged to her. The evidence is all to the effect that prior to the year 1934 all of the proceeds of the farm were used for the support of the family and that there was no surplus. During that year, however, an account was opened with the Farmers State Bank at Somonauk in the name of Grace Dolder and the deposits in that account consisted chiefly of checks received by Frank Dolder from the Carter Grain and Lumber Company for grain which was raised on the Dolder farm and sold to this company. The evidence is that Frank, Grace and Edgar Dolder each had the right to make withdrawals from said account and practically all of the farm equipment and machinery thereafter purchased by Edgar Dolder was paid for by him from this account.

their payment was secured by a chattel mortgage. Edgar testified and it was not contradicted that he paid these notes when they became due. He also testified, without contradiction, that the corn elevator and gasoline engine listed as formerly belonged to the grandfather of Edgar but who in the fall of 1927 gave them to Edgar, who repaired them, and they have been on the farm since then. The McCormick Deering No. 8 Combine, involved herein, was purchased by Edgar from George Barrett on October 22, 1927 and an instrument so showing was offered and admitted in evidence. It further appears that in the Spring of 1928 Edgar purchased the harrow from George Nelson for Fifty Dollars and that he paid one-half of the purchase price and gave his note for the balance, which note was signed by himself and his mother Grace Dolder. The two bottom tractor plow was purchased by Edgar in 1930, the binder was bought by Edgar in the Summer of 1927 from Vote and Grandscorse and in the same summer he purchased the tractor corn cultivator from George Nelson, paying Fifty Dollars down and giving his note which was also signed by his mother for the balance of the purchase price.

Edgar Dolder and his father both testified that the father had no interest in the personal property involved herein and that Grace Mrs. Barnhart all testified that the cows, heifers and horses claimed by Mrs. Barnhart belonged to her. The evidence is all to the effect that prior to the year 1934 all of the proceeds of the farm were used for the support of the family and that there was no surplus. During that year, however, an account was opened with the Farmers State Bank at Somerset in the name of Grace Dolder and the deposits in that account consisted entirely of checks received by Grace Dolder from the Carter Grain and Lumber Company for grain which was raised on the Dolder farm and sold to this company. The evidence is that Frank, Grace and Edgar Dolder each had the right to make withdrawals from said account and practically all of the farm equipment and machinery thereafter purchased by Edgar Dolder was paid for by him from this account.

The evidence further discloses that practically all of the grain raised on the farm from the year 1932 until the time of the trial was sold to the said Carter Grain and Lumber Company and the account was kept in the name of Frank Dolder and all the checks in payment therefor were issued to him, who endorsed them and after the bank account was opened the checks were deposited the re in the account carried in the name of Grace Dolder. In 1933, 1934 and 1935 government loans on the corn raised on the farm were obtained. The various instruments necessary to be executed were executed by the father Frank Dolder and the proceeds placed in the Grace Dolder account. The checks received from the government and from the elevator where the grain was sold were endorsed by Frank Dolder and over his signature appears a statement to the effect that in accepting and endorsing them he warranted to the maker of the checks that he was the sole owner of the grain for which the checks were issued. Other instruments were also executed by Frank Dolder in connection with sealing the corn for the purpose of procuring a government loan, in which it was recited that he was the sole owner of the grain raised during these years.

Counsel for appellant contends that the judgment of the trial court is contrary to the law and manifestly against the weight of the evidence. They argue that the contention of Edgar that he is the owner of any of the property levied upon is frivolous and unbelievable and call our attention to the fact that when Edgar went upon the farm in the Spring of 1932, he was only seventeen years of age and was without farm equipment or experience. Counsel further insist that the evidence discloses that Frank Dolder had a right to withdraw the funds fromthe account kept in the name of his wife Grace Dolder, that therefore the funds must be held to belong to him and that carrying the account in the name of Grace Dolder was not simply because Edgar was a minor or that it was more convenient for all to have the account so carried in her name, but the only reasonable conclusion that can be arrived at is that the real purpose of these interested was to hinder, delay and defraud the creditors of Frank Dolder and that the agreement between the father and son was, as a matter of law, a secret trust in favor

of the father and void as to his creditors. Counsel cite Blackman v. Preston, 123 Ill. 381, the facts in which case they say are on "all fours" with the instant case and also call our attention to Birney v. Solomon, 348 Ill. 410.

The facts in Blackman v. Preston, supra, are not in any way similar to the facts disclosed by this record. In the Blackman case the father, on March 17, 1875 signed and acknowledged two deeds, one of which purported to convey to one of his sons, then eleven or twelve years of age, eighty acres of his two hundred acre farm. By the other deed he purported to convey to another son, then six years of age, the remaining one hundred and twenty acres. The deeds were put in a desk, after being placed in the hands of the grantees, and in August, 1881, when it became apparant that the father was insolvent, he, the father, placed the deeds on record. The bill, among other things, sought to cancel these deeds. Inaffirming the decree of the lower court, which granted the relief sought, the court held that these deeds to the sons were not intended to take effect until after the death of the father, were in the nature of testamentary devises and therefore inoperative as deeds. Birney v. Solomon, supra, was a creditor's bill to set aside conveyances made by Jacob Solomon and his wife to Alexander Wilson and by Wilson to Hazel Solomon, the wife of Jacob. The Court held that the conveyance was a voluntary one and made by Solomon when he was in failing circumstances and while largely indebted and that it not only tended to hinder but did actually hinder and delay his creditors and therefore must be deemed to have been fraudulently made. The court, in sustaining the decree of the trial court which set aside the conveyances, said: "What may be in the mind of the grantor when he makes a voluntary conveyance to his wife or child is immaterial, for if it results in hindering, delaying or defrauding creditors, it must be regarded as fraudulent".

In the instant case it is not claimed that Frank Dolder had any personal property of any particular value in the Spring of 1932 when he left Ottawa and went to make his home on the farm. The evidence is that he had failed in the garage business and was physically ill. The evidence is that his sister, Mrs. Farnham, furnished the money

of the father and void as to his creditors. Counsel cite Bloomer v. Frazer, 125 Ill. 321, the facts in which case bear not on "all fours" with the instant case and also call our attention to Birney v. Solomon, 325 Ill. 410.

The facts in Bloomer v. Frazer, supra, are not in any way similar to the facts disclosed by this record. In the Bloomer case, the father, on March 17, 1875 signed and acknowledged two deeds, one of which purported to convey to one of his sons, then aleven or twelve years of age, eighty acres of his two hundred acre farm. By the other deed he purported to convey to another son, then six years of age, the remaining one hundred and twenty acres. The deeds were put in a safe, after being placed in the hands of the grantees, and in August, 1881, when it became apparent that the father was insolvent, he, the father, placed the deeds on record. The bill, among other things, sought to cancel these deeds. Affirming the decree of the lower court, which granted the relief sought, the court held that these deeds to the sons were not intended to take effect until after the death of the father, were in the nature of testamentary devises and therefore inoperative as deeds. Birney v. Solomon, supra, was a creditor's bill to set aside conveyances made by Joseph Solomon and his wife to Alexander Wilson and by Wilson to Israel Solomon, the wife of Joseph. The Court held that the conveyance was a voluntary one and made by Solomon when he was in failing circumstances and while largely indebted and that it not only tended to hinder but did actually hinder and delay his creditors and therefore must be deemed to have been fraudulently made. The court, in sustaining the decree of the trial court which set aside the conveyances, said: "What may be in the mind of the grantor when he makes a voluntary conveyance to his wife or child is immaterial, for if it results in hindering, delaying or defrauding creditors, it must be regarded as fraudulent".

In the instant case it is not claimed that Frank Foiler had any personal property of any particular value in the spring of 1929 when he left Ottawa and went to make his home on the farm. The evidence is that he had failed in the grocery business and was physically ill. The evidence is that his father, Mrs. Foiler, Mrs. [illegible]

with which the cows and horses were purchased, that she left Edgar have them and with them farm operations were commenced. For the first two or three years whatever was made on the farm was used to support those who lived there. Mrs. Farnham usually received her rent from the elevator where the grain was hauled and it was not until the crops raised in 1934 were disposed of that there was any money which justified the opening of a bank account. When the account was opened, it was in the mother's name and the deposits consisted altogether of checks received when a government loan was obtained or when the grain was sold and the excess over and above what was required to pay off the loan was deposited in the family account. There is no question here of a conveyance from a father to his son to avoid the payment of the father's debts. Appellant here insists that the grain and hay levied upon must belong to Frank Dolder, because he, the father, lived upon the farm upon which it was raised and in former years he assumed for some purposes to be the owner thereof. It is true that the father did, in former years, for the purpose of procuring a government loan , represent that he was the sole owner thereof and that Edgar acquiesced therein, that the father received the checks when the grain was sold and Edgar consented thereto and if this was a proceeding in which Edgar was taking an inconsistent position from the one he then assumed in a proceeding between him and those whom he had misled, he would be estopped to deny that his father was the owner of the grain involved here, but so far as appellant is concerned, Edgar did nothing to mislead him. The indebtedness evidenced by the note upon which judgment was taken was contracted in 1917, fifteen years before Frank Dolder or Edgar started to farm. Appellant lost no rights, nor was he injured or his position altered or changed in any way because of the fact that the elevator account was kept in the name of Frank Dolder or because Edgar Dolder knew and permitted Frank Dolder to procure a government loan by representing that he was the sole owner of the sealed corn.

The evidence is that Edgar attained his majority more than two years before appellant obtained his judgment against his father and

with which the cows and horses were purchased, that one Jack Edgar have them and with them farm operations were commenced. For the first two or three years whatever was made on the farm was used to support those who lived there. Mrs. Farnham usually received her rent from the elevator where the grain was hauled and it was not until the crops raised in 1924 were disposed of that there was any money which justified the opening of a bank account. When the account was opened, it was in the mother's name and the deposits consisted altogether of checks received when a government loan was obtained or when the grain was sold and the excess over and above what was required to pay off the loan was deposited in the family account. There is no question here of a conveyance from a father to his son to avoid the payment of the father's debts. Appellant here insists that the grain and her levied upon must belong to Frank Dolder, because he, the father, lived upon the farm upon which it was raised and in former years he assumed for some purposes to be the owner thereof. It is true that the father did, in former years, for the purpose of procuring a government loan, represent that he was the sole owner thereof and that Edgar acquiesced therein, that the father received the checks when the grain was sold and Edgar cooperated thereto and if this was a proceeding in which Edgar was taking an inconsistent position from the one he then assumed in a proceeding between him and those who may had misled, he would be estopped to deny that his father was the owner of the grain involved here, but so far as appellant is concerned, Edgar did nothing to mislead him. The inadvertence evidenced by the note upon which judgment was taken was corrected in 1917, fifteen years before Frank Dolder or Edgar started to farm. Appellant lost no rights, nor was he injured or his position altered or changed in any way because of the fact that the elevator account was kept in the name of Frank Dolder or because Edgar Dolder knew and permitted Frank Dolder to procure a government loan by representing that he was the sole owner of the sealed corn.

The evidence is that Edgar attained his majority more than two years before appellant obtained his judgment against his father and

there is no evidence in the record sustaining appellant's contention that the property claimed by Mrs. Farnham ever belonged to Frank Dolder. The evidence is also that Edgar actually bought practically all of the farm machinery involved herein and purchased the seed that was planted, which produced the corn levied upon, and Frank Dolder had no part in those transactions. Edgar did practically all the farm work, he was in possession of the property upon which appellant caused his execution to be levied and was exercising acts of ownership thereto. Mrs. Farnham, Edgar and Frank Dolder know the facts. They testified. The trial court believed them. From all the evidence appearing in this record, we would not be justified in disturbing the findings and judgment of the trial court and the judgment appealed from will therefore be affirmed.

JUDGMENT AFFIRMED.

there is no evidence in the record sustaining appellant's contention that the property alleged by Mrs. Farnham ever belonged to Frank Dolder. The evidence is also that Edgar actually owned practically all of the farm machinery involved herein and purchased the seed that was planted, which produced the corn levied upon, and Frank Dolder had no part in those transactions. Edgar did practically all the farm work, he was in possession of the property upon which appellant caused his execution to be levied and was exercising acts of ownership thereto. Mrs. Farnham, Edgar and Frank Dolder knew the facts. They testified. The trial court believed them. From all the evidence appearing in this record, we would not be justified in disturbing the findings and judgment of the trial court and the judgment appealed from will therefore be affirmed.

JUDGMENT AFFIRMED.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32) 7

9304

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 3rd day of May, in the year of our Lord one thousand nine hundred and thirty-eight, within and for the Second District of the State of Illinois:

Present -- The Hon. FRANKLIN R. DOVE, Presiding Justice
Hon. FRED G. WOLFE, Justice
Hon. BLAINE HUFFMAN, Justice
JUSTUS L. JOHNSON, Clerk
RALPH H. DESPER, Sheriff

296 I.A. 649[4]

BE IT REMEMBERED, that afterwards, to-wit: On AUG 30 1938 the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

Gen. No. 9304 Agenda No. 30

IN THE APPELLATE COURT OF ILLINOIS,

Second District

May Term, A. D. 1938

Yetta Myers, Administratrix of the Estate of George D. Myers, deceased,

Appellee

vs.

Sears, Roebuck & Company, a corporation,

Appellant.

Appeal from Circuit Court of Kane County.

HUFFMAN - J.

Appellant operated a farm implement store at 6 North River Street, in Aurora. The store was known as the Sears Roebuck & Company Farm Store. When appellant became tenant of the building, it installed a hoisting elevator near the rear, by cutting a hole in the floor five or six feet square, through which it lowered and raised merchandise to and from the basement. No fence or guard rail was placed around this opening. Merchandise was stacked on three sides of it, leaving the north side exposed, except for an empty crate or packing box about six feet long and three feet wide, kept setting along the north side of the hatchway, as a barricade to this side of the opening, at such times as the hoist was not in use. When in use, the crate was removed. On October 16, 1936, plaintiff's intestate went to appellant's store for the purpose of purchasing some wire fencing. He communicated his desire to the clerk of the store, whereupon the clerk and the deceased went to the back of the store where the wire was kept. Here the deceased selected the wire he desired to purchase.

The store building of appellant set east and west. The front entrance was at the east end. Across the back end of the building was constructed a loading platform, where merchandise was loaded and unloaded. A partial roll of wire was found which suited the purposes

Gen. No. 9304 Agenda No. 30

IN THE APPELLATE COURT OF ILLINOIS,

Second District

May Term, A. D. 1932

Yetta Myers, administratrix of the
Estate of George D. Myers, deceased,

Appellee

vs.

Appeal from Circuit
Court of Lake County.

Sears, Roebuck & Company, a corporation,

Appellant.

HUTTMAN - J.

Appellant operated a farm implement store at 6 North River Street, in Aurora. The store was known as the Sears Roebuck & Company Farm Store. When appellant became tenant of the building, it installed a hoisting elevator near the rear, by cutting a hole in the floor five or six feet square, through which it lowered and raised merchandise to and from the basement. No fence or guard rail was placed around this opening. Merchandise was stocked on three sides of it, leaving the north side exposed, except for an empty crate or packing box about six feet long and three feet wide, kept setting along the north side of the hatchway, as a barricade to this side of the opening, at such times as the hoist was not in use. When in use, the crate was removed. On October 14, 1929, plaintiff's intestate went to appellant's store for the purpose of purchasing some wire fencing. He communicated his desire to the clerk of the store, whereupon the clerk and the deceased went to the back of the store where the wire was kept. Here the deceased selected the wire he desired to purchase.

The store building of appellant set east and west. The front entrance was at the east end. Across the back end of the building was constructed a loading platform, where merchandise was loaded and unloaded. A partial roll of wire was found which suited the purposes

of the decedent. The clerk did not know how many feet were left in this remnant and the deceased thought that he would need about 120 feet. Conversation was had between them as to the possible price for the entire roll, providing it contained enough wire. The manager stated that he would take the wire to the loading platform at the rear of the building, unroll and measure it. The wire was too heavy for him to carry and he started toward the back door moving the roll of wire before him on end by a teetering process as one would move a loaded barrel on end. In order to reach the back door which opened on the loading platform, it was necessary to go through a storage room in the rear end of the building, in which room the hatchway was located. The deceased started to follow appellant's clerk through this storage room toward the rear door and the loading platform. While the employee was thus engaged in moving the wire and the deceased in following him, the deceased fell through the open hatchway to the cement floor of the basement, some twelve feet below, sustaining injuries from which he died on the second day following the accident. Appellee administratrix brought this suit for the wrongful death of her husband. The case was tried before a jury which returned a verdict in favor of appellee for the sum of $5280. Appellant prosecutes this appeal from the judgment of the court upon the verdict.

The position of plaintiff in the trial was, that the defendant in maintaining a store for the sale of goods, thereby invited the patronage of the public; that the deceased was a customer of the defendant and an invitee in said store for the purposes above set forth, and that it became and was the duty of the defendant to exercise reasonable care for his safety; that the defendant failed in this regard and because of its negligence in maintaining the open hoist or hatchway in the floor, unguarded by a fence or guard rail, and not otherwise safely protected, the deceased fell through same and was killed.

The position of the defendant in the trial was, that the deceased was not an invitee of the defendant in this part of its store building; that he was not lawfully in the storage room; that he was not invited

of the decedent. The clerk did not know how many feet were left in this remnant and the deceased thought that he would need about 120 feet. Conversation was had between them as to the possible price for the entire roll, providing it contained enough wire. The manager stated that he would take the wire to the loading platform at the rear of the building, unroll and measure it. The wire was too heavy for him to carry and he started toward the back door rolling the roll of wire before him on end by a teetering process as one would move a loaded barrel on end. In order to reach the back door which opened on the loading platform, it was necessary to go through a storage room in the rear end of the building, in which room the hatchway was located. The deceased started to follow appellant's clerk through this storage room toward the rear door and the loading platform. While the employee was thus engaged in moving the wire and the deceased in following him, the deceased fell through the open hatchway to the cement floor of the basement, some twelve feet below, sustaining injuries from which he died on the second day following the accident. Appellee administratrix brought this suit for the wrongful death of her husband. The case was tried before a jury which returned a verdict in favor of appellee for the sum of $2880. Appellant prosecutes this appeal from the judgment of the court upon the verdict.

The position of plaintiff in the trial was, that the defendant in maintaining a store for the sale of goods, thereby invited the patronage of the public; that the deceased was a customer of the defendant and an invitee in said store for the purposes above set forth, and that it became and was the duty of the defendant to exercise reasonable care for his safety; that the defendant failed in this regard and because of its negligence in maintaining the open hatch or hatchway in the floor, unguarded by a fence or guard rail, and not otherwise safely protected, the deceased fell through same and was killed.

The position of the defendant in the trial was, that the deceased was not an invitee of the defendant in this part of its store building; that he was not lawfully in the storage room; that he was not invited

into this part of the building, and was a mere trespasser during the entire time he was in the storage room where the hatchway was located. Defendant denied negligence on its part, denied due care on the part of the deceased, and alleged that his contributory negligence was the sole and only cause of the accident and his injuries. The main contention of the defendant was that the storage room in which the deceased was injured, was not a part of defendant's store devoted to selling merchandise; and no part of its store to which the decedent, as a customer, was invited; that it was a part of the store not open to the public, but used for the storage of goods, and that plaintiff's intestate was not, either expressly or impliedly, invited to enter said room by the defendant; and that therefore he did so at his own peril, as a licensee, volunteer, or trespasser.

It appears from the testimony of Mr. Duncan, an employee and salesman of appellant, who was on duty at the time deceased came to the store to purchase the wire, that he was the only employee at the store at that time, and when the deceased arrived, the witness was on the sidewalk engaged in washing the front windows. This was shortly after nine o'clock in the morning. The deceased stated his mission, whereupon the clerk invited him in, and they walked back through the store to where the roll of wire was standing on the floor. Here some conversation was had regarding the wire and the price, and as to the number of feet in the roll. The clerk said that he did not know how many feet there were in the roll and inquired of the decedent how much wire he desired. Whereupon, he advised the clerk that he thought about one hundred and twenty feet. The deceased then asked the clerk how he was going to find out how much wire there was in the roll, and the clerk stated that he told him he would take it out on the back platform and measure it. This particular roll was a remnant and some conversation was had about what price the entire roll could be bought for, providing it contained enough wire. The clerk states that he told the decedent he would have to measure the wire; that he then opened the door which led into the back room of the building, which is referred to as the storage room, and started teetering the roll of wire on end as he would a barrel, toward

into this part of the building, and was a mere trespasser during the entire time he was in the storage room where the railway was located. Defendant denied negligence on its part, denied the care on the part of the deceased, and alleged that his contributory negligence was the sole and only cause of the accident and his injuries. The main contention of the defendant was that the storage room in which the deceased was injured, was not a part of defendant's store devoted to selling merchandise; and no part of its store to which the deceased, as a customer, was invited; that it was a part of the store not open to the public, but used for the storage of goods, and that plaintiff's intestate was not, either expressly or impliedly, invited to enter said room by the defendant; and that therefore he did so at his own peril, as a licensee, volunteer, or trespasser.

It appears from the testimony of Mr. Dawson, an employee and salesman of appellant, who was on duty at the time deceased came to the store to purchase the wire, that he was the only employee at the store at that time, and when the deceased arrived, the witness was on the sidewalk engaged in washing the front windows. This was shortly after nine o'clock in the morning. The deceased stated his errand, whereupon the clerk invited him in, and they walked back through the store to where the roll of wire was standing on the floor. There some conversation was had regarding the wire and the price, and as to the number of feet in the roll. The clerk said that he did not know how many feet there were in the roll and inquired of the deceased how much wire he desired. Whereupon, he advised the clerk that he thought about one hundred and twenty feet. The deceased then asked the clerk how he was going to find out how much wire there was in the roll, and the clerk stated that he told him he would take it out on the back platform and measure it. This particular roll was a remnant and some conversation was had about what price the entire roll could be bought for, providing it contained enough wire. The clerk states that he told the deceased he would have to measure the wire; that he then opened the door which led into the back room of the building, which is referred to as the storage room, and started tostering the roll of wire on and as he would a barrel, toward

the rear door which opened onto the loading platform. The wire was too heavy for the clerk to carry and his attention was absorbed by the manner in which he was moving it toward the back door. The clerk states that when he was about two-thirds of the way to the back door, he heard the deceased start to speak, and turned just in time to see him fall through the hatchway. The witness states that the deceased at the time he saw him falling, was in the act of walking around the end of the crate which was kept placed along the north edge of the opening. The witness further says that the deceased moved the crate at the time he fell, but that such act and the act of falling happened at the same time. It is the position of this witness that the crate was on the floor in its accustomed place, extending across the opening, at the time the deceased fell through same. The deceased was attempting to follow the clerk to the loading platform where the wire was to be measured, and was about eight feet behind the clerk when he fell. The clerk states that the crate set up against some wire close by the hatchway and that the deceased in undertaking to walk around the wire, moved the crate out of his path far enough so he could get around the corner of it, and that when he undertook to step around the crate, he fell through the opening, leaving the crate hanging over the edge of the hatchway. The witness states that after the accident he did not touch the crate; that when the police officers arrived, it was in the same position as when the deceased fell through the opening. This witness sent the call for an ambulance and went to the basement to help the deceased.

The clerk further testified that the back store room, which opened onto the loading platform, was not used as a sales room. It does appear from his testimony, however, that customers did go into this room to get merchandise or to help load merchandise from the loading platform at the rear of the store, but that goods were not sold from that room. There is no contention as to the condition of the opening and the method which appellant used to guard same. Two police officers answered the call and were present at the time the deceased was removed from the basement to the ambulance and taken to the hospital. The police officers state that they saw the hatchway in the floor; that it was about the center of the store room, and about five feet square; that a packing box was

the rear door which opened onto the loading platform. The wire was too heavy for the clerk to carry and his attention was absorbed by the manner in which he was moving it toward the back door. The clerk states that when he was about two-thirds of the way to the back door, he heard the deceased start to speak, and turned just in time to see him fall through the hatchway. The witness states that the deceased at the time he saw him falling, was in the act of walking around the end of the crate which was kept placed along the north edge of the opening. The witness further says that the deceased moved the crate at the time he fell, but that such act and the act of falling happened at the same time. It is the position of this witness that the crate was on the floor in its accustomed place, extending across the opening, at the time the deceased fell through same. The deceased was attempting to follow the clerk to the loading platform where the wire was to be measured, and was about eight feet behind the clerk when he fell. The clerk states that the crate set up against some wire close by the hatchway and that the deceased in undertaking to walk around the wire, moved the crate out of his path far enough so he could get around the corner of it, and that when he undertook to step around the crate, he fell through the opening, leaving the crate hanging over the edge of the hatchway. The witness states that after the accident he did not touch the crate; that when the police officers arrived, it was in the same position as when the deceased fell through the opening. This witness sent the call for an ambulance and went to the basement to help the deceased.

The clerk further testifies that the back store room, which opened onto the loading platform, was not used as a sales room. It does appear from his testimony, however, that customers did go into this room to get merchandise or to help load merchandise from the loading platform at the rear of the store, but that goods were not sold from that room. There is no contention as to the condition of the opening and the method which appellant used to guard same. Two police officers answered the call and were present at the time the deceased was removed from the basement to the ambulance and taken to the hospital. The police officers state that they saw the hatchway in the floor; that it was about the center of the store room, and about five feet square; that a packing box was

standing on end near the corner of the opening; that this crate was about five feet high and three feet wide, and standing upright by the west side of the hatchway, and that the north side of the opening was unprotected. The police officers state that after taking the injured man to the hospital, they returned to the store where they found the packing box or crate then laid down in front of the exposed portion of the hatchway. They further state that the same clerk was there at that time.

There is evidence of two witnesses to the effect that they were at appellant's store at different times before the accident, and they were in the room where the deceased fell through the hatchway. They were there for the purpose of buying wire, plows, and other goods, and the loading of purchases of heavy merchandise from the loading platform at the rear of the store. One of these witnesses states that he had seen the hatchway and the other one says that he had never seen it. It appears that the floor had no particular color but was a sort of a dark neutral color such as would be produced by the use of a wooden floor over a period of time, which had had no paint on it.

Seven witnesses testified for the defendant below. They were all employees of the defendant. None of them were at the store at the time of the accident except Mr. Duncan, who ran the store for appellant. It appears that he is the sole clerk and salesman at this store except at the noon hour when he is relieved by Mr. Ode, who is employed by appellant at one of its other stores in Aurora. He was the clerk in charge of selling goods at this store. He says that when sales of heavy merchandise were made, the customers would assist him in loading such purchases from the loading platform. The testimony of the other witnesses has to do largely with the store and its arrangement with regard to the display of merchandise, the manner in which it was ordinarily operated with respect to the sale of goods, and the ~~bait~~ habit and custom of keeping the packing crate across the north edge of the opening of the hatchway when the same was not in use.

However, the fact remains that appellant's clerk in charge of this store took the deceased back to that part of the building where the wire

ing on and near the corner of the opening; that this crate was five feet high and three feet wide, and standing upright by the side of the hatchway, and that the north side of the opening was located. The police officers state that after taking the injured to the hospital, they returned to the store where they found the box or crate then laid down in front of the exposed portion of hatchway. They further state that the same clerk was there at the time.

There is evidence of two witnesses to the effect that they were in appellant's store at different times before the accident, and that in the room where the deceased fell through the hatchway. They were there for the purpose of buying wire, glass, and other goods, and witnessing of purchases of heavy merchandise from the loading platform in the rear of the store. One of these witnesses states that he was near the hatchway and the other one says that he had never seen it. It appears that the floor had no particular color but was a sort of a material color such as would be produced by the use of a wooden floor over a period of time, which had had no paint on it.

Seven witnesses testified for the defendant below. They were all employees of the defendant. None of them were at the store at the time of the accident except Mr. Duncan, who ran the store for appellant. It appears that he is the sole clerk and salesman at this store except at noon hour when he is relieved by Mr. Cox, who is employed by appellant at one of its other stores in Aurora. He was the clerk in charge of selling goods at this store. He says that when sales of heavy merchandise were made, the customers would assist him in loading them from the loading platform. The testimony of the other witnesses has to do largely with the store and its arrangement with respect to the display of merchandise, the manner in which it was ordinarily handled with respect to the sale of goods, and the exit and custom of opening the packing crate across the north edge of the opening of the hatchway when the same was not in use.

However, the fact remains that appellant's clerk in charge of this store took the deceased back to that part of the building where the crate

was kept, for the purpose of making a sale in the ordinary course of business. This particular roll of wire was a remnant and the clerk and the deceased talked about a possible price to be paid for the entire roll as it existed. The purchaser did not want to make such a transaction unless he knew the roll contained enough wire to meet his needs, and the salesman did not want to enter into such a transaction until he knew how many feet of wire remained in the roll. In order to determine this, the salesman stated to the deceased that he would take the roll out to the loading platform and measure it. The deceased was with appellant's clerk during all of this time and started to accompany him to the loading platform to see the wire measured. There was nothing unusual or unexpected in this conduct. The measuring of the wire was an act in which both parties were mutually interested. The parties were together and the clerk had ample opportunity to see and observe the conduct of the deceased in following him to the loading platform. He also had ample opportunity to instruct the deceased not to follow him, or to go back to the front of the store, or to advise him of the open hatchway through which he fell. It is not claimed that the clerk did any of these things. The parties were equally interested in knowing how many feet of wire there were in the roll. Otherwise the sale could not be consummated. It was natural for the purchaser to want to see the wire measured. We are of the opinion that the deceased was lawfully in the storeroom of appellant at the time, in company with appellant's clerk, while carrying on appellant's business in the sale of its merchandise.

Appellant urged that the court erred in giving instructions number 5, 6, 7, 8, 9, 11 and 12 on behalf of appellee. Space will not permit a discussion of these instructions, but they have been carefully considered. It is our opinion that the jury was fairly instructed, and no reversible error exists in the instructions complained of by appellant.

The questions of defendant's negligence and the deceased's contributory negligence, were questions for the consideration of the jury under the evidence in this case. The jury has resolved those questions in favor of the plaintiff and we are not disposed

was kept, for the purpose of making a sale in the ordinary course of business. This particular roll of wire was a remnant and the clerk and the deceased talked about a possible price to be paid for the entire roll as it stained. The purchaser did not want to make such a transaction unless he knew the roll contained enough wire to meet his needs, and the salesman did not want to enter into such a transaction until he knew how many feet of wire remained in the roll. In order to determine this, the salesman stated to the deceased that he would take the roll out to the loading platform and measure it. The deceased was with appellant's clerk during all of this time and started to accompany him to the loading platform to see the wire measured. There was nothing unusual or unexpected in this conduct. The measuring of the wire was an act in which both parties were mutually interested. The parties were together and the clerk had ample opportunity to see and observe the conduct of the deceased in following him to the loading platform. He also had ample opportunity to instruct the deceased not to follow him, or to go back to the front of the store, or to advise him of the open hatchway through which he fell. It is not claimed that the clerk did any of these things. The parties were equally interested in knowing how many feet of wire there were in the roll. Otherwise the sale could not be consummated. It was natural for the purchaser to want to see the wire measured. We are of the opinion that the deceased was lawfully in the storeroom of appellant at the time, in company with appellant's clerk, while carrying on appellant's business in the sale of its merchandise.

Appellant urged that the court erred in giving instructions number 3, 4, 5, 8, 9, 11 and 12 on behalf of appellee. Space will not permit a discussion of these instructions, but they have been carefully considered. It is our opinion that the jury was fairly instructed, and no reversible error exists in the instructions complained of by appellant.

The questions of defendant's negligence and the deceased's contributory negligence, were questions for the consideration of the jury under the evidence in this case. The jury has resolved those questions in favor of the plaintiff and we are not disposed

to disturb the verdict.

It was the duty of the appellant to exercise reasonable care for the safety of the deceased. He was in appellant's store as a customer and accompanied appellant's agent and clerk to the room where the hatchway was located, with the knowledge of such clerk. His purpose in going to the loading platform at the rear of the store was the same as the clerk's. It was the duty of appellant to use reasonable diligence to keep the hatchway securely and safely protected. At the time this accident happened, the statute defined this duty on the part of appellant with respect to its employees. Ch. 48, sec. 106, Ill. St. 1937.

Appellee has raised certain points in regard to the admission of testimony, not for the purpose of a reversal, but merely for the purpose of securing an expression of the court in regard to those matters. Since the judgment is affirmed, it is not deemed necessary to consider the points raised by appellee.

Judgment affirmed.

to disturb the vehicle.

It was the duty of the appellant to exercise reasonable care for the safety of the deceased. He was in appellant's store as a customer and accompanied appellant's agent and clerk to the room where the battery was located, with the knowledge of such clerk. His purpose in going to the loading platform at the rear of the store was the same as the clerk's. It was the duty of appellant to use reasonable diligence to keep the battery securely and safely protected. In the time this accident occurred, the statute defined this duty on the part of appellant with respect to its employees. Ch. 48, sec. 108, Ill. St. 1927.

Appellee has raised certain points in regard to the admission of testimony, not for the purpose of a reversal, but merely for the purpose of securing an expression of the court in regard to these matters. Since the judgment is affirmed, it is not deemed necessary to consider the points raised on appellee.

Judgment affirmed.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32) 7

9307

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 3rd day of May, in the year of our Lord one thousand nine hundred and thirty-eight, within and for the Second District of the State of Illinois:

Present -- The Hon. FRANKLIN R. DOVE, Presiding Justice
Hon. FRED G. WOLFE, Justice
Hon. BLAINE HUFFMAN, Justice
JUSTUS L. JOHNSON, Clerk
RALPH H. DESPER, Sheriff

296 I.A. 649

BE IT REMEMBERED, that afterwards, to-wit: On AUG 30 1938 the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

Gen. No. 9307 Agenda No. 9

IN THE APPELLATE COURT OF ILLINOIS,

SECOND DISTRICT

MAY TERM, A. D. 1938.

ROBERT J. CRIDDLE,

Appellee,

vs.

EMIL VOHLKEN, JOHN VOHLKEN and FREEPORT STANDARD DAIRY CORPORATION,

Appellants.

APPEAL FROM CIRCUIT COURT STEPHENSON COUNTY.

HUFFMAN - J.

This is an action for the specific performance of a contract. The complaint alleges that appellee was the owner of a dairy business in the city of Freeport, and operated the same under the name of the Criddle Dairy, and that appellants Emil and John Vohlken were each the owners of a one-third interest in a dairy business in the city of Freeport, operated under the name of the Highland Dairy. It is further alleged that the said Emil and John Vohlken approached appellee with a proposition to combine and incorporate their two business enterprises, and to thereafter operate them as a corporation, and that the Vohlken brothers as a part of said proposal, stated that they would vote their shares of stock in the proposed corporation to elect and retain appellee in a salaried position as secretary and manager of the corporation, and that he should have issued to him in his own right, one-half the voting stock of the corporation, and that he should vote his shares to elect John Vohlken, President, and Emil Vohlken, Treasurer, both as salaried officers of the corporation.

Pursuant to the above proposal, the following written agreement was entered into:

> "This agreement entered into this 7th day of May 1927 Between Robert J. Criddle, city of Freeport, County of Stephenson, and State of

Gen. No. 9507 Agenda No. 7

IN THE APPELLATE COURT OF ILLINOIS,

SECOND DISTRICT

MAY TERM, A. D. 1928.

ROBERT T. CRIDDLE,

Appellee,

vs.

EMIL VONLINEN, JOHN VONLINEN and FREEPORT STANDARD DAIRY CORPORATION,

Appellants.

APPEAL FROM CIRCUIT COURT STEPHENSON COUNTY.

HUTCHESON - 1.

This is an action for the specific performance of a contract. The complaint alleges that appellee was the owner of a dairy business in the city of Freeport, and operated the same under the name of the Criddle Dairy, and that appellants Emil and John Vonlinen were each the owners of a one-third interest in a dairy business in the city of Freeport, operated under the name of the Highland Dairy. It is further alleged that the said Emil and John Vonlinen approached appellee with a proposition to combine and incorporate their two business enterprises, and to thereafter operate them as a corporation, and that the Vonlinen brothers as a part of said proposal, stated that they would vote their shares of stock in the proposed corporation to elect and retain appellee in a salaried position as secretary and manager of the corporation, and that he should have issued to him in his own right, one-half the voting stock of the corporation, and that he should vote his shares to elect John Vonlinen, President, and Emil Vonlinen, Treasurer, both as salaried officers of the corporation.

Pursuant to the above proposal, the following written agreement was entered into:

"This agreement entered into this 7th day of May 1927 between Robert T. Criddle, city of Freeport, County of Stephenson, and State of

Illinois, party of the first part, and John Vohlken, Emil Vohlken parties of the second part, witnesseth:

It is agreed by and between the above named parties that in the event a corporation is formed * * * for the purpose of supplying milk to Freeport, Illinois by the above named parties, the party of the first part agrees to be a part of said corporation in consideration of one-half the voting stock in the said corporation for his interest in his own dairy, Known as the Criddle Dairy, located at Freeport, Illinois.

It is further agreed by and between the above named parties that in the event said corporation is formed and chartered the following named officers shall be nominated and elected, namely,
John Vohlken - President, Robert J. Criddle, Secretary and Manager, Emil Vohlken, Treasurer.

In Witness whereof, the parties have hereunto set their hands this ..... day of ..... A.D. 1927.

Emil Vohlken
Robert J. Criddle
John Vohlken"

The Vohlken brothers sold their interest in the Highland Dairy to the party owning the other one-third thereof. Subsequently, they and appellee organized an Illinois corporation designated as the Freeport Standard Dairy Corporation, with a capital stock of 1000 shares, having a par value of $100 each, the Vohlken brothers substituting the cash they received for their interest in the Highland Dairy instead of the property. Appellee ~~is~~ in compliance with the above contract, conveyed his dairy to the corporation, and voted for John Vohlken as President, and Emil Vohlken as Treasurer, at salaries equal to that of appellee. Appellee became secretary and manager of the corporation and continued so until April 24, 1935. Appellee alleges the Vohlken brothers as officers, directors and stockholders of the corporation, caused to be issued to him 216 shares as a part compliance and performance of the contract, but that during the entire time of his connection with the corporation as secretary and manager, he was treated and recognized as the owner of one-half of all the shares, and as a stockholder given authority as the owner of one-half thereof. Appellee further alleges that on April 24, 1935, he and the Vohlken brothers

Illinois, party of the first part, and John Vohlken, Emil Vohlken parties of the second part, witnesseth:

It is agreed by and between the above named parties that in the event a corporation is formed * * * for the purpose of supplying milk to Freeport, Illinois by the above named parties, the party of the first part agrees to be a part of said corporation in consideration of one-half the voting stock in the said corporation for the interest in his own dairy, known as the Middle Dairy, located at Freeport, Illinois.

It is further agreed by and between the above named parties that in the event said corporation is formed and contained the following officers shall be nominated and elected, namely, John Vohlken - President, Robert G. Middle, Secretary and Treasurer, Emil Vohlken, Treasurer.

In witness whereof, the parties have hereunto set their hands this ..... day of ..... A.D. 1927.

Emil Vohlken
Robert G. Middle
John Vohlken"

The Vohlken brothers sold their interest in the Highland Dairy to the party owning the other one-third thereof. Subsequently, they and Appellee organized an Illinois corporation designated as the Freeport Standard Dairy Corporation, with a capital stock of 100 shares, having a par value of $100 each, the Vohlken brothers exhibiting the cash they received for their interest in the Highland Dairy instead of the property. Appellee in accordance with the above contract, conveyed his dairy to the corporation, and voted for John Vohlken as president, and Emil Vohlken as treasurer, at salaries equal to that of Appellee. Appellee became secretary, and manager of the corporation and continued so until April 24, 1925. Appellee alleges the Vohlken brothers as officers, directors and stockholders of the corporation, caused to be issued to him 215 shares as a part consideration and performance of the contract, but that during the entire time of his connection with the corporation as secretary and manager, he was treated and recognized as the owner of one-half of all the shares, and as a stockholder given authority as the owner of one-half thereof. Appellee further alleges that on April 24, 1925, he and the Vohlken brothers

constituted the Board of Directors of appellant corporation; that on said date, a meeting of the board was had whereat appellee demanded that certificate for 284 shares of the corporation be issued and delivered to him in accordance with the terms of the contract; that the Vohlken brothers refused to so issue such certificate and that they thereupon assumed exclusive control of the corporation, discharged appellee as manager thereof, and since said date have excluded him from any participation in the management of the company, and thereafter denied him any information regarding its operation. Appellee alleges the shares were not listed on any stock exchange, nor bought and sold on any market, and that therefore there was no way by which the market value could be established or ascertained. He asks for a specific performance of the contract by the issuance and delivery to him of certificate for 284 shares of stock in appellant corporation, which with the 216 shares he already holds, would make a total of 500 shares.

The answer filed by appellants admits that John and Emil Vohlken discussed the matter of combining the two dairies into a corporation, denies that the Vohlken brothers agreed to vote their corporate stock to elect and retain appellee in the salaried position of secretary and manager of the corporation, but states that they agreed to vote a sufficient amount of their stock so that it, together with the stock owned by appellee, would give him equal voting power with them. The answer denies any agreement that appellee should have issued to him one-half of the voting stock in said corporation. The answer admits the execution of the agreement, the organization of the corporation as claimed, the transfer thereto by appellee of his dairy property and that the Vohlken brothers sold their two-thirds interest in the Highland Dairy and substituted the cash received therefor, in the corporation of appellant company, in lieu of the property of the Highland Dairy. The answer denies that the corporation assumed the duties, liabilities and obligations

constituted the Board of Directors of appellant corporation; that on said date, a meeting of the board was had wherein appellee demanded that certificate for 334 shares of the corporation be issued and delivered to him in accordance with the terms of the contract; that the Vohlken brothers refused to be issued such certificate and that they thereupon assumed exclusive control of the corporation, discharged appellee as manager thereof, and since said date have excluded him from any participation in the management of the company, and thereafter denied him any information regarding its operation. Appellee alleges the shares were not listed on any stock exchange, nor bought and sold on any market, and that therefore there was no way by which the market value could be established or ascertained. He sues for a specific performance of the contract by the issuance and delivery to him of certificate for 334 shares of stock in appellant corporation, which with the 216 shares he already holds, would make a total of 500 shares.

The answer filed by appellants admits that John and Will Vohlken discussed the matter of combining the two dairies into a corporation, denies that the Vohlken brothers agreed to vote their corporate stock to elect and retain appellee in the salaried position of secretary and manager of the corporation, but states that they agreed to vote a sufficient amount of their stock so that it, together with the stock owned by appellee, would give him equal voting power with them. The answer denies any agreement that appellee should have issued to him one-half of the voting stock in said corporation. The answer admits the execution of the agreement, the organization of the corporation as claimed, the transfer thereto by appellee of his dairy property and that the Vohlken brothers sold their two-thirds interest in the Highland Dairy and substituted the cash received therefor, in the corporation of appellant company, in lieu of the property of the Highland Dairy. The answer denies that the corporation assumed the duties, liabilities and obligations

expressed and implied in the above agreement, or that it ever ratified same; denies that appellee ever demanded the issuance to him of the 284 shares of stock claimed, and that the Vohlken brothers ever refused or denied appellee any information about the business subsequent to his withdrawal as manager thereof. The answer admits the stock has no listed value.

The cause was referred to a Master, who filed his report, wherein he found that within less than ninety days after the execution of the contract, appellee and the two Vohlken brothers, together with two other persons who each received one share of stock in the corporation, formed appellant corporation, and that this was the corporation contemplated by the parties when they entered into the contract. The Master found the contract to be valid and binding between the parties; that none of the acts and deeds of appellee amounted to a waiver of his rights under the contract; that his failure to demand one-half the voting stock in the corporation prior to the time he did so, did not work an estoppel; that such lapse of time had caused no disadvantage to the Vohlken brothers, and that no injury had resulted to them because of the failure of appellee to sooner demand his stock; that the stock of the corporation has no known value and is not listed on any stock exchange or other market; that appellee was entitled to specific performance of the contract by being invested by the defendants Emil and John Vohlken of one-half the voting stock of the corporation, but that he was not then entitled to have the 284 shares issued to him as prayed, because under such circumstances he would hold more than one-half of the voting stock of the corporation, as several hundred shares still remained unissued, and that unless all of the unissued stock should be issued, that appellee was only entitled to receive one-half of the voting stock as it existed at the time in question. The Master found that the Vohlken brothers could comply with the terms of the contract by investing the appellee with sufficient shares of stock already issued to bring about a holding by him of fifty percent of the issued stock, so that he would thereby have one-half of the voting stock, and that as the remaining stock might later be issued, appellee

expressed and implied in the above agreement, or that it ever
rightly came; denies that appellee ever demanded the issuance to him
of the 164 shares of stock claimed, and that the Vohlken brothers
ever refused or denied appellee any information about the business
subsequent to his withdrawal as manager thereof. The answer admits
the stock has no listed value.

The cause was referred to a master, who filed his report, wherein
he found that within less than ninety days after the execution of the
contract, appellee and the two Vohlken brothers, together with two
other persons who each received one share of stock in the corporation,
formed appellant corporation, and that this was the corporation con-
templated by the parties when they entered into the contract. The
master found the contract to be valid and binding between the parties;
that none of the acts and deeds of appellee amounted to a waiver of
his rights under the contract; that his failure to demand one-half
the voting stock in the corporation prior to the time he did so, did
not work an estoppel; that such lapse of time had caused no disadvantage
to the Vohlken brothers, and that no injury had resulted to them be-
cause of the failure of appellee to sooner demand his stock; that the
stock of the corporation has no known value and is not listed on any
stock exchange or other market; that appellee was entitled to specific
performance of the contract by being invested by the defendants Will
and John Vohlken of one-half the voting stock of the corporation, but
that he was not then entitled to have the 164 shares issued to him as
prayed, because under such circumstances he would have more than one-
half of the voting stock of the corporation, as several hundred shares
still remained unissued, and that unless all of the unissued stock
should be issued, that appellee was only entitled to receive one-half
of the voting stock as it existed at the time in question. The master
found that the Vohlken brothers could comply with the terms of the
contract by investing the appellee with sufficient shares of stock
already issued to bring about a holding by him of fifty percent of
the issued stock, so that he would thereby have one-half of the voting
stock, and that as the remaining stock might later be issued, appellee

was entitled to receive one-half thereof. The objections by appellants to the Master's report were overruled and stood as exceptions thereto before the Chancellor. Appellee filed objections to the Master's report with reference to the number of shares of stock that were found to be issued and outstanding. These objections stood as exceptions in the trial court, and were sustained by a finding that the total number of shares of stock issued and outstanding in said corporation were 663.

Decree was entered under date of November 26, 1937, which followed the finding of the Master with reference to the negotiations between appellee and the Vohlken brothers regarding the formation of appellant corporation. The decree finds that the contract between the parties is binding; that the corporation was organized pursuant thereto; that plaintiff transferred to the corporation the property and business of his dairy for 500 shares of stock therein, of which 500 shares he has received 216 shares; that the defendants John and Emil Vohlken have each received 216 shares; that there are fifteen additional shares issued and outstanding; that a total aggregate of 447 shares is issued and outstanding, exclusive of the 216 shares held by appellee; that under the terms of the contract, appellee is now entitled to receive from his block of 500 shares, which represents the price at which he conveyed his dairy, a sufficient number of shares to bring his holding up to one-half of the present issued stock of said corporation; that in order to do this, appellee was entitled to receive a certificate for 231 shares of stock which in addition to the 216 shares already issued to him, would bring his present holdings up to 447 shares, an amount equal to one-half of the outstanding shares of the voting stock of said corporation. The decree further found that at the time of the hearing, a total aggregate of 663 shares of stock was outstanding, 216 shares held by appellee, 216 shares held by each of the Vohlken brothers, and 15 shares held by other parties; that this left a total of 337 shares of stock which remained unissued; that the 231 shares ordered issued

was entitled to receive one-half thereof. The objections by appellants to the Master's report were overruled and stood as exceptions thereto before the chancellor. Appellee filed objections to the Master's report with reference to the number of shares of stock that were found to be issued and outstanding. These objections stood as exceptions in the trial court, and were sustained by a finding that the total number of shares of stock issued and outstanding in said corporation were 632.

Decree was entered under date of November 18, 1921, which followed the finding of the Master with reference to the negotiations between appellee and the Fuller brothers regarding the formation of appellant corporation. The decree finds that the contract between the parties is binding; that the corporation was organized pursuant thereto; that plaintiff transferred to the corporation the property and business of its dairy for 70 shares of stock thereto, of which 300 shares he has received 110 shares; that the defendants John and Will Fuller have each received 110 shares; that there are fifteen additional shares issued and outstanding; that a total aggregate of 447 shares is issued and outstanding, excluding of the 110 shares held by appellee; that under the terms of the contract, appellee is now entitled to receive from his share of 300 shares, which represents the price at which he conveyed his dairy, a sufficient number of shares to bring his holding up to one-half of the present issued stock of said corporation; that in order to do this, appellee was entitled to receive a certificate for 221 shares of stock which in addition to the 110 shares already issued to him, would bring his present holdings up to 447 shares, an amount equal to one-half of the outstanding shares of the voting stock of said corporation. The decree further found that at the time of the hearing, a total aggregate of 632 shares of stock was outstanding, 110 shares held by appellee, 110 shares held by each of the Fuller brothers, and 15 shares held by other parties; that this left a total of 327 shares of stock which remained unissued; that the 221 shares ordered issued

to appellee in this decree should come from the 337 shares of unissued stock, and that this would then leave 106 shares of stock yet unissued. The decree then provided that of the 106 shares which would remain unissued, that appellee should receive share for share thereof whenever any of such remaining 106 shares should be issued, until a total of 53 shares had issued to appellee.

On the day the decree was signed and filed, appellants made request for leave to file amendments to their answer, by alleging the defense of estoppel, waiver, and abandonment of the contract, by appellee, basing their motion on the ground that the answer might thus be made to conform to the proof. Leave was denied appellants to file such amendments. The defenses sought to be raised by appellants by the proposed amendments to their answer, were affirmative in character, and matters of defense which should be specially pleaded. They urge the right to file same in the trial court by virtue of Para. 3 of sec. 170, ch. 110, Ill. St. 1937, which provides that a pleading may be amended at any time, before or after judgment, to conform the pleadings to the proof.

Suit in this case was commenced in May, 1936. Motion to dismiss was filed June 15, 1936, and later denied. On November 6, 1936, plaintiffs below obtained a rule on defendants to plead by November 12, 1936. Answer was filed on November 13, 1936. The cause was referred to the Master on January 16, 1937. The Master took evidence upon two days, namely, June 8th and July 23rd, 1937, and his report was completed on this last named date. His report and findings were filed September 11, 1937. Objections were filed by appellants to the Master's report and overruled. They stood as exceptions in the trial court, and were there heard and denied. The decree was filed November 26, 1937. Upon this date, appellants made motion to file the above amendments to their answer on the ground that they might thus make their answer conform to the proof. They had been cognizant of what the proof was since the taking of the evidence in June and July previous.

to appellee in this decree should come from the 527 shares of unissued stock, and that this would then leave 106 shares of stock yet unissued. The decree then provided that of the 106 shares which would remain unissued, that appellee should receive shares for there thereof whenever any of such remaining 106 shares should be issued, until a total of 53 shares had issued to appellee.

On the day the decree was signed and filed, appellants made request for leave to file amendments to their answer, by alleging the defense of estoppel, waiver, and abandonment of the contract, by appellee, basing their motion on the ground that the answer might then be made to conform to the proof. Leave was denied appellants to file such amendments. The defenses sought to be raised by appellants by the proposed amendments to their answer, were affirmative in character, and matters of defense which should be specially pleaded. They were the right to file same in the trial court by virtue of Para. 3 of sec. 170, ch. 110, Ill. St. 1937, which provides that a pleading may be amended at any time, before or after judgment, to conform the pleadings to the proof.

Suit in this case was commenced in May, 1936. Motion to dismiss was filed June 15, 1936, and later denied. On November 6, 1936, plaintiffs below obtained a rule on defendants to plead by November 12, 1936. Answer was filed on November 18, 1936. The cause was referred to the Master on January 14, 1937. The Master took evidence upon two days, namely, June 8th and July 23rd, 1937, and his report was completed on this last named date. The report and findings were filed September 11, 1937. Objections were filed by appellants to the Master's report and overruled. They stood on exceptions in the trial court, and were there heard and denied. The decree was filed November 16, 1937. Upon this date, appellants made motion to file the above amendments to their answer on the ground that they might thus make their answer conform to the proof. They had been apprised of what the proof was since the taking of the evidence in June and July previous.

The power of amendment is incidental to the exercise of all judicial power, and so far as the mere power to amend is concerned, the Statutes of amendment are only declaratory of the common law. Most jurisdictions provide by statute that the court may, either before or after judgment, on such terms as may seem proper or just and reasonable, permit the amendment of any pleading. Courts have been disposed to grant the same indulgence to a defendant as to a plaintiff in respect to permitting amendments to pleadings. However, instances are rare in which amendments to an answer have been allowed after the case has been heard and there has been an expression of opinion from the court. It has been said that when the court is about to sign a final decree, it is too late to amend the answer by setting up defenses which were known to the defendant since the original answer. Under such circumstances, the party may be deemed guilty of gross negligence, and the matter rests in the sound discretion of the court. Vol. 1, Enc. Pl. & Pr. (Ch. on Amendments, pp. 463 -506). The paragraph on amendments to pleadings urged by appellants, is not intended to create or bring about a total disregard of all rules of pleadings because, such an application of those rules would serve to destroy the purpose of pleadings. We do not think the trial court abused its discretion in denying appellant's motion.

Four errors for reversal are assigned, which in fact raise but two questions; first, the refusal of the court to permit the amendments to the answer, and second, that the court erred in finding the equities for the plaintiff (appellee). The evidence discloses that the parties organized appellant corporation pursuant to a prearranged plan which came about at the instance of the Vohlken brothers; that their proposal was reduced to writing, and upon the organization of the corporation, appellee and the two Vohlken brothers proceeded to complete the same by electing themselves to the offices agreed upon, and proceeded to fix their salaries in the manner agreed upon. John Vohlken was the only one of the brothers who testified. His testimony shows that they each drew $175 a month salary at the start, which was increased to $260 per month later on, and later reduced to $190 per month. The evidence further shows that for two or three

The power of amendment is incidental to the exercise of all judicial power, and so far as the sole power to amend is concerned, the decision of a tribunal has only jurisdiction of any common law. Most jurisdictions provide by statute that the court may, either before or after judgment, in such terms as may seem proper or just and reasonable, permit the amendment of any pleading. Courts have been disposed to grant the same indulgence to a defendant as to a plaintiff in respect to permitting amendments to pleadings. However, instances are rare in which amendments to a answer have been allowed after the case has been heard and there has been an expression of opinion from the court. In one instance, for when the court is about to sign a final decree, it is too late to amend the answer by setting up defenses which were known to the defendant prior to the original answer. Under this circumstances, the right may be based upon of proper evidence, and the matter rests in the sound discretion of the court. Vol. 1, Sec. 1. 4 Ir. (Ib. or amendments, pp. 465 -466).

The paragraph on amendments to pleadings cited as authorities, is not intended to create or bring about a total disregard of all rules of pleadings because, such an application of these rules would serve to destroy the purpose of pleading. We do not think the trial court abused its discretion in denying appellant's motion.

Four errors for reversal are assigned, which in fact raise two questions; first, the refusal of the court to permit the amendments to the answer, and second, that the court erred in finding the equities for the plaintiff (appellee). The evidence discloses that the parties signified appellant corporation entered into a prearranged plan with the case about as the instance of the Fulton creamery; that their proposal was reduced to writing, and upon the stockholding of the corporation, appellee and the two Vollie brothers proceeded to complete the sale by electing themselves to the offices assigned them, and proceeded to fix their salaries in the manner stated then. John Vollie was the only one of the brothers who testified. His testimony showed that they each drew $175 a month salary at the start, which was increased to $200 per month later on, and later reduced to $150 per month. The evidence further shows that for two or three

years prior to April 24, 1935 (the date of the trouble), the salaries had fluctuated due to the fact that the company was not making any money, and in fact was becoming financially embarrassed. It appears that prior to April 24, 1935, the Vohlken brothers were each receiving $380 per month, but were actually drawing $350 each. Since that date, it appears that the witness John Vohlken has been drawing $175 per month and his brother $190 per month, and appellee no salary. The witness Vohlken admits stating to appellee at the time of the trouble, that the contract between appellee and the two brothers was no good and that the witness knew it when appellee signed same. It appears that appellee had reached an age where he did not want to place himself in a position where he might be driven out of business, and he states that it was because of this, he required the conditions that he should own fifty percent of the stock and be retained in a remunerative capacity, before he would enter into the agreement to place his dairy in the corporation. It further appears that the corporation was a money making proposition during the years after its organization, until the depression began to affect its sales and its ability to collect from its customers. It never paid any dividends on stock, the net earnings going to appellee and the two Vohlken brothers by way of salaries and drawing accounts. Appellee urges that this is one of the reasons he never insisted upon the issuance of the remainder of the stock. It further appears that Mr. Elder and Mr. Stelle, the other two stockholders, knew of the agreement prior to the organization of the corporation; that Mr. Elder drew it for the parties, and Mr. Stelle was present with appellee and the Vohlken brothers at the time. No other parties appear to have any interest therein except these two stockholders and the persons to this suit. The decree of the Chancellor does justice between the parties and we think should be affirmed.

Decree affirmed.

years prior to April 24, 1925 (the date of the trouble), the salaries had fluctuated due to the fact that the company was not making any money, and in fact was becoming financially embarrassed. It appears that prior to April 24, 1925, the Vohlken brothers were each receiving $250 per month, but were actually earning $250 each. Since that date, it appears that the witness John Vohlken has been drawing $175 per month and his brother $150 per month, and appellee no salary. The witness Vohlken admits absolutely to appellee at the time of the trouble, that the contract between appellee and the brothers was no good and that the witness knew it when appellee signed same. It appears that appellee had reached an age where he did not want to place himself in a position where he might be driven out of business, and he admits that it was because of this, he required the condition that he should own fifty percent of the stock and be retained in a responsible capacity, before he would enter into the agreement to place his dairy in the corporation. It further appears that the corporation was a money making proposition during the years after its organization, until the depression began to affect its sales and its ability to collect for its merchandise. It never paid any dividends on stock, the net earnings going to appellee and the two Vohlken brothers by way of salaries and drawing accounts. Appellee urges that this is one of the reasons he was insisted upon the insurance of the remainder of the stock. It further appears that Mr. Elder and Mr. Ibelle, the other two stockholders, knew of the agreement prior to the organization of the corporation; that Mr. Elder drew it for the parties, and Mr. Ibelle was present with appellee and the Vohlken brothers at the time. No other parties appear to have any interest therein except these two stockholders and the parties to this suit. The decree of the Chancellor does justice between the parties and we think should be affirmed.

Decree affirmed.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32) 7

9333

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 3rd day of May, in the year of our Lord one thousand nine hundred and thirty-eight, within and for the Second District of the State of Illinois:

Present -- The Hon. FRANKLIN R. DOVE, Presiding Justice
Hon. FRED G. WOLFE, Justice
Hon. BLAINE HUFFMAN, Justice
JUSTUS L. JOHNSON, Clerk
RALPH H. DESPER, Sheriff

296 I.A. 650

BE IT REMEMBERED, that afterwards, to-wit: On AUG 30 1938 the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

Gen. No. 9333 Agenda No. 26

IN THE APPELLATE COURT OF ILLINOIS,

SECOND DISTRICT

MAY TERM, A. D. 1938.

63 A

CATHERINE MOORE, Administratrix
of the estate of George B. Moore,
deceased,

Appellee

vs.

Appeal from Circuit Court
Peoria County.

ILLINOIS POWER AND LIGHT CORPORATION,

Appellant.

HUFFMAN - J.

This cause was before this court at a former term and a judgment in favor of the plaintiff was reversed and the cause remanded because the court deemed the judgment to be against the manifest weight of the evidence. (Moore v. Illinois Power and Light Corp., 286 Ill. App. 445). The facts were set out in detail in the former opinion, and do not differ materially from those existing in this appeal. Briefly stated, they are as follows: The deceased, age 34, had been a life long resident of Peoria; on the evening of May 1, 1934, he was at a tavern located on the northeast corner of the intersection of Adams and Evans streets in Peoria. Here he met Clarence Randall, with whom he had been previously employed at the same garage. They were both unemployed at the time in question. Randall states that he first saw the deceased at this tavern at about 8:00 o'clock that evening. He also saw the deceased at the above place at about thirty minutes past midnight (May 2nd); that the deceased stated he was going home; that he arose and started walking north on Adams street; that the deceased was looking south when talking to the witness; that after walking north a short distance on Adams street, he started to cross this street in a diagonal direction toward the northwest; that

Gen. No. 9335 Agenda No. 26

IN THE APPELLATE COURT OF ILLINOIS,

SECOND DISTRICT

MAY TERM, A. D. 1936.

CATHERINE MOORE, administratrix
of the estate of George E. Moore,
deceased,

Appellee

vs.

ILLINOIS POWER AND LIGHT CORPOR-
ATION,

Appellant.

Appeal from Circuit Court
Peoria County.

HUFFMAN - 1.

This cause was before this court at a former term and a judgment in favor of the plaintiff was reversed and the cause remanded because the court deemed the judgment to be against the manifest weight of the evidence. (Moore v. Illinois Power and Light Corp., 286 Ill. App. 445). The facts were set out in detail in the former opinion, and do not differ materially from those existing in this appeal. Briefly stated, they are as follows: The deceased, age 54, had been a life long resident of Peoria; on the evening of May 1, 1934, he was at a tavern located on the northeast corner of the intersection of Adams and Evans streets in Peoria. Here he met Clarence Kendall, with whom he had been previously employed at the same garage. They were both unemployed at the time in question. Kendall states that he first saw the deceased at this tavern at about 8:00 o'clock that evening. He also saw the deceased at the above place at about thirty minutes past midnight (May 2nd); that the deceased stated he was going home; that he arose and started walking north on Adams street; that the deceased was looking south when talking to the witness; that after walking north a short distance on Adams street, he started to cross this street in a diagonal direction toward the northwest; that

appellant's street car was coming north on Adams street; that two sets of tracks are in the center of this street, and the car was travelling on the east track; that the deceased was walking very rapidly and proceeded upon his course until he came to a point close enough to the east rail where he was hit by the front end of the car, knocked to the pavement, receiving injuries from which he died. The witness states that deceased was normal with respect to his sight and hearing so far as he knew, and that he had known him for some time. He further states that the deceased looked in the direction of the approaching car before going into the street; that the street was paved with brick; that the intersection was lighted and the street car was lighted; that it was making the usual noise of a street car; and that there was nothing between the deceased and the street car to obstruct his view as he approached the tracks. This was the only witness to the accident, other than the motorman. His testimony in this case does not vary in any material respect from the former trial. Other evidence appears, to establish the condition of Adams street, which runs north and south, and of its intersection with Evans street, the street lighting at the place in question, as well as the illumination of the street car itself. No traffic appears to have been upon the street at the time in question to distract the attention of the deceased.

Appellee urges that because two juries have found for the plaintiff, this court is bound to affirm the judgment, under authority of the case of Hinkle v. Block & Kuhl Co. 259 Ill. App. 674 (1930), which opinion was written by Mr. Justice Jones of this court, wherein it was stated: "Where a given state of facts has been successively submitted to juries, and they reached the same conclusion, and that conclusion has been approved by the trial judge, a court of review is not warranted in reversing the judgment even if it is inclined to take a different view of the facts from that taken by such juries." The language of a judicial opinion must be interpreted in the light of the contest. The opinion above referred to by appellee expressly finds that, "there was evidence

appellant's street car was coming north on Adams street; that two sets of tracks are in the center of this street, and the car was travelling on the east track; that the deceased was walking very rapidly and proceeded upon his course until he came to a point close enough to the east rail where he was hit by the front end of the car, knocked to the pavement, receiving injuries from which he died. The witness states that deceased was normal with respect to his sight and hearing so far as he knew, and that he had known him for some time. He further states that the deceased looked in the direction of the approaching car before going into the street; that the street was paved with brick; that the intersections was lighted and the street car was lighted; that it was making the usual noise of a street car; and that there was nothing between the deceased and the street car to obstruct his view as he approached the tracks. This was the only witness to the accident, other than the motorman. His testimony in this case does not vary in any material respect from the former trial. Other evidence appears, to establish the condition of Adams street, which runs north and south, and of its intersection with Evans street, the street lighting at the place in question, as well as the illumination of the street car itself. No traffic appears to have been upon the street at the time in question to distract the attention of the deceased.

Appellee urges that because two juries have found for the plaintiff, this court is bound to affirm the judgment, under authority of the case of Hinkle v. Block & Kuhl Co. 259 Ill. 494 (1930), which opinion was written by Mr. Justice Jones of this court, wherein it was stated: "Where a given state of facts has been successively submitted to juries, and they reached the same conclusion, and that conclusion has been approved by the trial judge, a court of review is not warranted in reversing the judgment even if it is inclined to take a different view of the facts from that taken by such juries." The language of a judicial opinion must be interpreted in the light of the context. The opinion above referred to by appellee expressly finds that, "there was evidence

tending to support the declaration***," and hence held that the plaintiff was entitled to have her case submitted to a jury, "unless it could be said, that as a matter of law, the testimony did not fairly tend to prove her cause of action."

In this case, the evidence of plaintiff's witness Randall, who was the only eye witness to the accident, tends to prove and establish the fact that the deceased received his injuries because of his contributory negligence and that such negligence was the proximate cause of such injuries. Therefore, the question before this court for determination as presented by this record is whether or not, the plaintiff's evidence being taken as true, with all intendments therefrom most favorable to plaintiff, is sufficient to establish the negligence charged. As stated in our former opinion (p.448), one having an unobstructed view of a street railway, is not justified in going upon the same at points between street intersections, without using reasonable diligence to ascertain if it is safe for him to cross. In this case the accident happened shortly past midnight, at a time when there was no traffic on the street except the street car in question. The street was paved fifty feet from curb to curb, level, lighted, and the view unobstructed. The street car likewise was brilliantly illuminated and making the usual noise common to the running of a street car. The plaintiff's evidence shows that the deceased looked toward the approaching car before starting to cross the street and at a time when the car was entering the intersection and was heard and observed by his companion with whom he was talking. Under such circumstances, the law will not permit one to claim that he looked and did not see the danger, where if he had properly exercised his faculties he would have seen it. (Citations former opinion, p. 449). The general knowledge and experience of mankind condemns such conduct as negligence. Greenwald v. B. & O. R.R. Co., 332 Ill. 627, 631; Provensano v. I.C. Ry. Co. 357 Ill. 192, 196; Grubb v. Ill. Terminal Co. 366 Ill. 330, 338; Edson v. Chicago & Northwestern Ry. Co. 291 Ill. App. 622.

tending to support the declaration***," and hence held that the plaintiff was entitled to have her case submitted to a jury, "unless it could be said, that as a matter of law, the testimony did not fairly tend to prove her cause of action."

In this case, the evidence of plaintiff's witness Randall, who was the only eye witness to the accident, tends to prove and establish the fact that the deceased received his injuries because of his contributory negligence and that such negligence was the proximate cause of such injuries. Therefore, the question before this court for determination as presented by this record is whether or not, the plaintiff's evidence being taken as true, with all intendments therefrom most favorable to plaintiff, is sufficient to establish the negligence charged. As stated in our former opinion (p.448), one having an unobstructed view of a street railway, is not justified in going upon the same at points between street intersections, without using reasonable diligence to ascertain if it is safe for him to cross. In this case the accident happened shortly past midnight, at a time when there was no traffic on the street except the street car in question. The street was paved fifty feet from curb to curb, level, lighted, and the view unobstructed. The street car likewise was brilliantly illuminated and making the usual noise common to the running of a street car. The plaintiffs evidence shows that the deceased looked toward the approaching car before starting to cross the street and at a time when the car was entering the intersection and was heard and observed by his companion with whom he was talking. Under such circumstances, the law will not permit one to claim that he looked and did not see the danger, where if he had properly exercised his faculties he would have seen it. (Citations former opinion, p. 449). The general knowledge and experience of mankind condemns such conduct as negligence. Greenwald v. S. & O. R.R. Co., 236 Ill. 327, 331; Provenzano v. I.C. Ry. Co. 237 Ill. 192, 193; Grubb v. Ill. Terminal Co. 366 Ill. 330, 332; Adson v. Chicago & Northwestern Ry. Co. 291 Ill. App. 423.

The doctor's testimony introduced on behalf of plaintiff, shows that the deceased suffered a skull fracture on the left side of the head just above the ear, a cut on the lip, and a small bruise on the right hip. The surgeon examined the deceased for fractured bones but found none. This refutes the claim that after being struck, he was dragged under and rolled about beneath the car. The evidence shows that he died from a cerebral hemorrhage resulting from the skull fracture.

It appears that the street car was about sixty feet north of the intersection at the time it came to a stop, and the deceased was lying on the pavement on the right side and toward the front end of the car. The motorman claims that he was running on about half power; that he saw a man standing on the corner of the street intersection but that the first he saw of the deceased was when he suddenly stumbled out into the front end of the street car from in front of an automobile that was parked along the east curb of Adams street. The motorman states that he immediately turned off the power and applied the emergency brakes, bringing the car to a stop within about six feet. He states that the right front corner of the vestibule struck the head of the deceased. He further claims that before reaching the intersection in question and while passing through same, he sounded the gong of the car continuously.

No useful purpose in this case would be served by another trial. It conclusively appears and is admitted that Randall was the only witness to the accident, other than the motorman. This trial was but a repetition of the former trial so far as the evidence is concerned. It is not a question here of the evidence tending to support the complaint, which would necessitate a submission to the jury for its consideration, but there is a failure of proof as to the counts of plaintiff's complaint, and as a matter of law, the testimony does not fairly tend to prove the plaintiff's cause of action. Accidents such as the one involved in this case, are to be regretted, but sympathy for the unfortunate victim and his family cannot justify a departure from the established rules governing

The doctor's testimony introduced on behalf of plaintiff, shows that the deceased suffered a skull fracture on the left side of the head just above the ear, a cut on the lip, and a small bruise on the right hip. The surgeon examined the deceased for fractured bones but found none. This refutes the claim that after being struck, he was dragged under and rolled about beneath the car. The evidence shows that he died from a cerebral hemorrhage resulting from the skull fracture.

It appears that the street car was about sixty feet north of the intersection at the time it came to a stop, and the deceased was lying on the pavement on the right side and toward the front end of the car. The motorman claims that he was running on about half power; that he saw a man standing on the corner of the street intersection but that the first he saw of the deceased was when he suddenly stumbled out into the front end of the street car from in front of an automobile that was parked along the east curb of Adams street. The motorman states that he immediately turned off the power and applied the emergency brakes, bringing the car to a stop within about six feet. He states that the right front corner of the vestibule struck the head of the deceased. He further claims that before reaching the intersection in question and while passing through same, he sounded the gong of the car continuously.

No useful purpose in this case would be served by another trial. It conclusively appears and is admitted that Kendall was the only witness to the accident, other than the motorman. This trial was but a repetition of the former trial so far as the evidence is concerned. It is not a question here of the evidence tending to support the complaint, which would necessitate a submission to the jury for its consideration, but there is a failure of proof as to the counts of plaintiff's complaint, and as a matter of law, the testimony does not fairly tend to prove the plaintiff's cause of action. Accidents such as the one involved in this case, are to be regretted, but sympathy for the unfortunate victim and his family cannot justify a departure from the established rules governing

liability in such cases.

The judgment of the Circuit Court is therefore reversed.

Judgment reversed.

liability in such cases.

The judgment of the Circuit Court is therefore reversed.

Judgment reversed.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32)

9308

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 3rd day of May, in the year of our Lord one thousand nine hundred and thirty-eight, within and for the Second District of the State of Illinois:

Present -- The Hon. FRANKLIN R. DOVE, Presiding Justice
Hon. FRED G. WOLFE, Justice
Hon. BLAINE HUFFMAN, Justice
JUSTUS L. JOHNSON, Clerk
RALPH H. DESPER, Sheriff

296 I.A. 650

BE IT REMEMBERED, that afterwards, to-wit: On [illegible] the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

General No. 9308 Agenda No. 10

In the Appellate Court of Illinois

Second District

May Term, A. D. 1938

H. Rubin,

Plaintiff-Appellant,

vs. Appeal from the Circuit Court

City of Rockford, Illinois, of Winnebago County

and Charles F. Brown, et al,

Defendants-Appellees.

WOLFE, J.

On July 28, 1937, the appellant, H. Rubin, filed a petition for a writ of mandamus in the Circuit Court of Winnebago County against the City of Rockford and the Board of Alderman, praying that the defendants be ordered to issue him a license for a junk yard in the City of Rockford.

The petition alleges that H. Rubin, the petitioner, was a resident of the City of Rockford, and had been such resident for a period of more than ten years; that prior to June, 1936, he had been operating a junk yard in the City of Rockford and was duly licensed by the said city to operate the said yard according to the ordinances of the City of Rockford; that on June 16, 1936, he purchased real estate and improvements thereon in the eighteen hundred block of South Fifth Street, known as the Lytton Veneer property in the City of Rockford, with the intention of it being used and occupied by him for the purpose of operating and keeping a junk yard for purchasing and selling junk; that on said date he went into possession of said premises and commenced to use the same for the junk business and has continued to use the same. The petition further alleges that on June 29, 1936, he filed a written application with the City Clerk of the City of Rockford, Illinois, and requested the transfer of the license theretofore issued to the petitioner for the operation and

General No. 9308 Agenda No. 10

In the Appellate Court of Illinois

Second District

May Term, A. D. 1939

H. Rubin,

Plaintiff-Appellant,

va. Appeal from the Circuit Court

City of Rockford, Illinois, of Winnebago County

and Charles F. Brown, et al,

Defendants-Appellees.

WOLFE, J.

On July 29, 1937, the appellant, H. Rubin, filed a petition for a writ of mandamus in the Circuit Court of Winnebago County against the City of Rockford and the Board of Aldermen, praying that the defendants be ordered to issue him a license for a junk yard in the City of Rockford.

The petition alleges that H. Rubin, the petitioner, was a resident of the City of Rockford, and had been such resident for a period of more than ten years; that prior to June, 1936, he had been operating a junk yard in the City of Rockford and was duly licensed by the said city to operate the said yard according to the ordinances of the City of Rockford; that on June 10, 1936, he purchased real estate and improvements thereon in the eighteen hundred block of South Fifth Street, known as the Lytton Veneer property in the City of Rockford, with the intention of it being used and occupied by him for the purpose of operating and keeping a junk yard for wrecking and selling junk; that on said date he went into possession of said premises and commenced to use the same for the junk business and has continued to use the same. The petition further alleges that on June 29, 1936, he filed a written application with the City Clerk of the City of Rockford, Illinois, and requested the transfer of the license theretofore issued to the petitioner for the operation and

carrying on of the junk yard at 218 Kent Street, Rockford, Illinois, to the premises so purchased and occupied by him and hereinbefore described; that said application was duly received and referred to the License Committee of the City Council of said city; that said application was referred to the License Committee and on July 27, 1936, said committee recommended that no action be taken upon the application because the city had passed an ordinance reclassifying the property under the Zoning Ordinance so that the property could not be used legally for the carrying on the business of a junk yard. The petitioner alleges that the ordinance referred to in the city's report was null and void and of no effect; that said application was again referred to the License Committee of the City of Rockford, and on June 1, 1937, the License Committee recommended to the Council that the transfer of the license should be issued, but the City Council rejected the application and denied the petition.

The petition further alleges that on June 21, 1937, he filed with the defendant, the City of Rockford, Illinois, an application for a license for the operation and carrying on the business as a keeper of a junk yard and that the same was in full compliance with all terms and conditions of the ordinances in force and effect at the time of the application; that said application was duly referred to the License Committee of said City of Rockford; that on June 28, 1937, the License Committee recommended to the Board of Alderman the granting of the application for the license of the petitioner for the operation of a junk yard; that the building inspector had passed favorably upon the property as being in compliance with the ordinances of the building inspectors and the chief of the fire department of said city; that they found no reason for not granting the petition; that the application for the license of said petitioner was rejected by the City of Rockford wholly without cause and contrary to the law and the rights of petitioner and contrary to the ordinances in such

carrying on of the junk yard at 918 Kent Street, Rockford, Illinois, to the premises so purchased and occupied by him and hereinbefore described; that said application was duly received and referred to the License Committee of the City Council of said city; that said application was referred to the License Committee and on July 27, 1936, said committee recommended that no action be taken upon the application because the city had passed an ordinance reclassifying the property under the Zoning Ordinance so that the property could not be used legally for the carrying on the business of a junk yard. The petitioner alleges that the ordinance referred to in the city's report was null and void and of no effect; that said application was again referred to the License Committee of the City of Rockford, and on June 1, 1937, the License Committee recommended to the Council that the transfer of the license should be issued, but the City Council rejected the application and denied the petition.

The petition further alleges that on June 21, 1937, he filed with the defendant, the City of Rockford, Illinois, an application for a license for the operation and carrying on the business as a keeper of a junk yard and that the same was in full conformance with all terms and conditions of the ordinances in force and effect at the time of the application; that said application was duly referred to the License Committee of said City of Rockford; that on June 28, 1937, the License Committee recommended to the Board of Aldermen the granting of the application for the license of the petitioner for the operation of a junk yard; that the building inspector had passed favorably upon the property as being in compliance with the ordinances of the building inspector and the chief of the fire department of said city; that they found no reason for not granting the petition; that the application for the license of said petitioner was rejected by the City of Rockford wholly without cause and contrary to the law and the rights of petitioner and contrary to the ordinances in such

cases made and provided, which ordinances were in full force and effect at the time the applications for transfer of license as hereinbefore set forth; that it was mandatory upon the City Council of the City of Rockford to issue a license to any person or persons for the operation and the carrying on of the business of a junk yard within the City of Rockford when such applicant had complied with all the terms and conditions of said ordinance; that the petitioner had complied with all the terms and conditions of the ordinances and is now ready, willing and able to comply with all its terms and provisions and that he was entitled to be granted a license for such business. The petition ends with a prayer for a writ of mandamus directing the defendants to issue a license for the carrying on of a junk yard in the City of Rockford, Illinois, and for general relief. His petition is verified.

The defendants filed joint and several answers in which they admit most of the facts as alleged in the petition, but deny that the petitioner had complied with all the ordinances in the operation of a junk yard, and that he is not now legally using the premises in question for which he is now making application for a license. They deny that the application for a transfer and issuance of the license was as stated in the petitioner's complaint. They deny that the zoning ordinance passed on July 6, 1936, was not in full force and effect, but on the contrary state that it is still in full force and effect. They deny that the license was rejected by the City of Rockford wholly without cause, and without any legal justification, or contrary to law, and denies that it is mandatory on the City Council of the City of Rockford to issue a license to any person for the operation of a junk yard within the City of Rockford when the said applicant has complied with all the terms and conditions of the ordinances of said City of Rockford, but allege that it is in the discretion of the City Council to issue or refuse such license. The answer was not verified and was filed August 31, 1937.

The plaintiff, to maintain the issues in his behalf, introduced

cases made and provided, which ordinances were in full force and effect at the time the applications for transfer of licenses as aforesaid before set forth; that it was mandatory upon the City Council of the City of Rockford to issue a license to any person or persons for the operation and the carrying on of the business of a junk yard within the City of Rockford when such applicant had complied with all the terms and conditions of said ordinance; that the petitioner had complied with all the terms and conditions of the ordinances and is now ready, willing and able to comply with all its terms and provisions and that he was entitled to be granted a license for such business. The petition ends with a prayer for a writ of mandamus directing the defendants to issue a license for the carrying on of a junk yard in the City of Rockford, Illinois, and for general relief. The petition is verified.

The defendants filed joint and several answers in which they admit most of the facts as alleged in the petition, but deny that the petitioner had complied with all the ordinances in the operation of a junk yard, and that he is not now legally using the premises in question for which he is now making application for a license. They deny that the application for a transfer and issuance of the license was as stated in the petitioner's complaint. They deny that the zoning ordinance passed on July 6, 1931, was not in full force and effect, but on the contrary state that it is still in full force and effect. They deny that the license was revoked by the City of Rockford illegally without cause, and without any legal justification, or contrary to law, and deny that it is mandatory on the City Council of the City of Rockford to issue a license to any person for the operation of a junk yard within the City of Rockford when the said applicant has complied with all the terms and conditions of the ordinances of said City of Rockford, but allege that it is in the discretion of the City Council to issue or refuse such license. The answer was not verified and was filed August 31, 1937.

The plaintiff, to maintain the issues in his behalf, introduced

a deed to the property in question showing that he had legal title to the same. A number of the revised ordinances of the City of Rockford relative to the issuance of licenses to junk dealers et al, and the ordinances commonly designated as "Zoning Ordinances" were introduced in evidence. Also the minutes and proceedings of the City Council relative to the different applications that the plaintiff had made to said council for the transfer or issuance of a license to him to operate a junk yard, and the action of the City Council upon said application, were placed in evidence.

Isadore Rubin, a son of the petitioner, testified that he had been employed ten years or more by his father; that he was familiar with the premises known as the Lytton Veneer property on South Fifth Street in the City of Rockford; that his father negotiated for the purchase of that property for the purpose of using it for a junk yard and, in fact, had been using it for a junk yard ever since April, 1936, when his father purchased it. He also stated that they were now operating a junk yard without a license.

Elmer O. Strand, the City Clerkof the City of Rockford, Illinois, was called to the witness stand on behalf of the defendants and he identified defendant's Exhibit No. 1, which is an ordinance admitted to be passed on July 6, 1936. This ordinance was offered in evidence and upon an objection by the plaintiff the court refused to admit the same in evidence.

Over the objection of the plaintiff the City Clerk identified defendant's Exhibit No. 2, which is an ordinance with reference to the amendment in the Zoning Ordinances of the City of Rockford. Said ordinances were passed November 1, 1937. This is ordinance paragraph 6 and 7, section 2 of the Zoning Ordinance. Section 2 of the City Ordinances defines and classifies the different districts of zones by number. Number 6 is designated as the First Industrial District. Before this amendment was passed, junk yards were permitted in the First Industrial District and the petitioner's property is located within this district, but the amendment added it to section 7. Said

a deed to the property in question showing that he had legal title to the same. A number of the revised ordinances of the City of Rockford relative to the issuance of licenses to junk dealers et al, and the ordinances commonly designated as "Zoning Ordinances" were introduced in evidence. Also the minutes and proceedings of the City Council relative to the different applications that the plaintiff had made to said council for the transfer or issuance of a license to him to operate a junk yard, and the action of the City Council upon said application, were placed in evidence.

Isadore Rubin, a son of the petitioner, testified that he had been employed ten years or more by his father; that he was familiar with the premises known as the Rytton Tanner property on South Fifth Street in the City of Rockford; that his father purchased for the purchase of that property for the purpose of using it for a junk yard and, in fact, had been using it for a junk yard ever since April, 1936, when his father purchased it. He also stated that they were now operating a junk yard without a license.

Elmer O. Strand, the City Clerk of the City of Rockford, Illinois, was called to the witness stand on behalf of the defendants and he identified defendant's Exhibit No. 1, which is an ordinance admitted to be passed on July 6, 1936. This ordinance was offered in evidence and upon an objection by the plaintiff the court refused to admit the same in evidence.

Over the objection of the plaintiff the City Clerk identified defendant's Exhibit No. 2, which is an ordinance with reference to the amendment in the Zoning Ordinance of the City of Rockford. Said ordinances were passed November 1, 1937. This ordinance paragraphs 6 and 7, section Zero the Zoning Ordinance. Section 2 of the City Ordinance defines and classifies the different districts of zones by number. Number 8 is designated as the first industrial district. Before this amendment was passed, junk yards were permitted in the First Industrial District and the petitioner's property is located within this district, but the amendment added it to section 7. Said

section 7 enumerates what businesses shall not be conducted in the First Industrial District, and this amendment adds the following: "Storage, bailing, packing, or treatment of scrap paper, iron, bottles, rags, or junk of any kind." This was all the evidence the defendants offered.

On December 30, 1937, the court entered an order denying the petitioner his writ of mandamus. Part of the order is as follows: "And the Court further finds that the City Council is specifically given the power to regulate and direct the location of all places of business of purchasers, traders and dealers in junk, rags and any secondhand article whatsoever; and that by denying the application of said Petitioner, the City Council refused to permit such a business in the locality described in the petition;

"And the Court further finds that by the passage of a valid Zoning Ordinance subsequent to the application for a license in this cause, the City Council excluded from the area mentioned and described in this case all junk yards as above described; and the Court further finds that the prayer of said petition for a writ of mandamus should be denied".

It is conceded that the City Council of Rockford had the authority to pass zoning ordinances such as has been introduced in evidence in this case, and had authority to regulate and license junk dealers in the City of Rockford. It is insisted by the appellant that when he made application for a license he had complied with all the ordinances, and that he purchased the property in question in good faith, and at the time of the purchase it was legal and lawful to conduct a junk business in said property, because it was included in the Zoning Ordinance in the First Industrial District and when he had complied with all of the laws and ordinances, that he was entitled to a license to conduct a junk yard. The defendants, by their answer,

section 7 enumerates that businesses shall not be conducted in the First Industrial District, and this amendment adds the following: "Storage, baling, packing, or treatment of scrap paper, iron, bottles, rags, or junk of any kind." This was all the evidence the defendants offered.

On December 30, 1927, the court entered an order denying the petitioner his writ of mandamus. Part of the order is as follows: "And the Court further finds that the City Council is specifically given the power to regulate and direct the location of all places of business of purchasers, traders and dealers in junk, rags and any secondhand article whatsoever; and that by denying the application of said petitioner, the City Council refused to permit such a business in the locality described in the petition;

"And the Court further finds that by the passage of a valid Zoning Ordinance subsequent to the application for a license in this cause, the City Council excluded from the area mentioned and described in this case all junk yards as above described; and the Court further finds that the prayer of said petition for a writ of mandamus should be denied".

It is conceded that the City Council of Rockford had the authority to pass zoning ordinances such as has been introduced in evidence in this case, and had authority to regulate and license junk dealers in the City of Rockford. It is insisted by the appellant that when he made application for a license he had complied with all the ordinances, and that he purchased the property in question in good faith, and at the time of the purchase it was legal and lawful to conduct a junk business in said property, because it was included in the Zoning Ordinance in the First Industrial District and when he had complied with all of the laws and ordinances, then he was entitled to a license to conduct a junk yard. The defendants, by their answer,

claim that they had discretion and can grant or refuse a license as they see fit and that the ordinance passed July 6, 1936, amending the Zoning Ordinance was a valid ordinance and was in force and effect since the day of its passage. This was the only defense set forth in the answer and the case was tried upon that theory. In the case Of Kennedy et al v. The City of Evanston, 348 Ill. 426, on page 429 the court uses this language: "If a general zoning ordinance is passed and persons buy property in a certain district they have a right to rely upon the rule of law that the classification made in the general ordinance will not be changed unless the change is required for the public good. Where the amendment of a zoning ordinance is clearly an arbitrary and unreasonable action on the part of the city council and not authorized or contemplated by the zoning statute it is of no force and effect."

As before stated, over the objection of the plaintiff the defendants were permitted to introduce in evidence the revised ordinance prohibiting junk yards in the First Industrial District. This ordonance was not passed until long after the defendants had filed their answer and it is not contended in their answer that this ordinance is any defense to the action. The answer was not amended to include this defense. Under our statute a mandamus proceeding is a Common Law action and therefore governed by the same rules of pleading that are applicable to other actions at law. Dement v. Rokker, 126 Ill. 174; The People v. Board of Review, 263 Ill. 329. If the defendants wished to avail themselves of this defense the answer should have been amended so as to include such defense. The record clearly shows that the plaintiff had made several applications in his endeavor to procure a license to operate this junk yard and that he had complied in all respects with all of the ordinances of the City of Rockford in making his several applications; that he had been refused such license and then after the last refusal he started this suit to compel the City Council of Rockford to issue to him

claim that they had discretion and can grant or refuse a license as they see fit and that the ordinance passed July 6, 1936, amending the Zoning Ordinance was a valid ordinance and was in force and effect since the day of its passage. This was the only defense set forth in the answer and the case was tried upon that theory. In the case of Kennedy et al v. The City of Evanston, 343 Ill. 425, on page 440 the court uses this language: "If a general zoning ordinance is passed and persons buy property in a certain district they have a right to rely upon the rule of law that the classification made in the general ordinance will not be changed unless the change is required for the public good. Where the amendment of a zoning ordinance is clearly an arbitrary and unreasonable action on the part of the city council and not authorized or contemplated by the zoning statute it is of no force and effect."

As before stated, over the objection of the plaintiff the defendants were permitted to introduce in evidence the revised ordinance prohibiting junk yards in the First Industrial District. This ordinance was not passed until long after the defendants had filed their answer and it is not contended in their answer that this ordinance is any defense to the action. The answer was not amended to include this defense. Under our statute a mandamus proceeding is a Common Law action and therefore governed by the same rules of pleading that are applicable to other actions at law. Dennis v. Dunker, 128 Ill. 174; The People v. Board of Review, 255 Ill. 324. If the defendants wished to avail themselves of this defense the answer should have been amended so as to include such defense. The record clearly shows that the plaintiff had made several applications to the defendant to procure a license to operate this junk yard and that he had complied in all respects with all of the ordinances of the City of Rockford in making his several applications; that he had been refused such license and then after the last refusal he commenced this suit to compel the City Council of Rockford to issue to him

such license; that shortly thereafter the defendants filed their answer. The rights of the parties were to be determined as of the time the case was at issue. The amendment of the Zoning Ordinances was not passed untilsseveral months after the case was at issue. The passing of the amendment ordinance on November 23, could not deprive the plaintiff of a right that existed on August 3 of the same year. It is our opinion that the court erred in admitting defendant's Exhibit No. 2 in evidence.

The defendants have assigned cross-errors that the court refused to admit in evidence their Exhibit No. 1. They concede that this ordinance was not a valid and existing ordinance,, but claim that the same should have been admitted for the purpose of showing an expression of the will of the City Council with reference to the location of the junk yard. We cannot agree with this contention. We think that the court properly rejected this offer.

It is earnestly insisted that the issuance of a license is largely a matter of discretion with the City Council and that the court will not interfere with that discretion. The City of Rockford by a zoning ordinance designated in what district in the city said junk yards could operate. The plaintiff relied upon these ordinances and purchased in good faith the property in question for a junk yard. He then made application in regular form for a license to operate his junk yard, after the City Council had designated the district in which it was lawful to operate junk yards, and the plaintiff fully complied with all the written ordinances provided by said city and his application for a license was in due form. It is our conclusion that the plaintiff was entitled to a license to operate a junk yard as a matter of right. Rockford Amusement Co. v. Board of Supervisors, 251 Ill. App. 599; Grove v. Board of Supervisors, 246 Ill. App. 241.

such licenses; they shortly thereafter the defendants filed their answer. The rights of the parties were to be determined as of the time the case was at issue. The amendment of the Zoning Ordinance was not passed until several months after the case was at issue. The passing of the amendment ordinance on November 23, could not deprive the plaintiff of a right that existed on August 3 of the same year. It is our opinion that the court erred in admitting defendant's Exhibit No. 2 in evidence.

The defendants have assigned cross-error that the court refused to admit in evidence their Exhibit No. 1. They concede that this ordinance was not a valid and subsisting ordinance, but claim that the same should have been admitted for the purpose of showing an expression of the will of the City Council with reference to the location of the junk yard. We cannot agree with this contention. We think that the court properly rejected this offer.

It is sometimes insisted that the issuance of a license is largely a matter of discretion with the City Council and that the court will not interfere with that discretion. The City of Rockford by a zoning ordinance designated in what district in the city said junk yards could operate. The plaintiff relied upon these ordinances and purchased in good faith the property in question for a junk yard. He then made application in regular form for a license to operate his junk yard, after the City Council had designated the district in which it was lawful to operate junk yards, and the plaintiff fully complied with all the written ordinances provided by said City and his application for a license was in due form. It is our conclusion that the plaintiff was entitled to a license to operate a junk yard as a matter of right. Rockford Amusement Co. v. Board of Supervisors, 251 Ill. App. 295; Grove v. Board of Supervisors, 245 Ill. App. 247.

The judgment of the Circuit Court of Winnebago County is hereby reversed and remanded to the said court with directions to issue the writ of mandamus as prayed for in said petition.

Reversed and remanded with directions.

The judgment of the Circuit Court of Winnebago County is hereby reversed and remanded to the said court with directions to issue the writ of mandamus as prayed for in said petition.

Reversed and remanded with directions.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32) 7

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 3rd day of May, in the year of our Lord one thousand nine hundred and thirty-eight, within and for the Second District of the State of Illinois:

Present -- The Hon. FRANKLIN R. DOVE, Presiding Justice
Hon. FRED G. WOLFE, Justice
Hon. BLAINE HUFFMAN, Justice
JUSTUS L. JOHNSON, Clerk
RALPH H. DESPER, Sheriff

296 I.A. 650[3]

BE IT REMEMBERED, that afterwards, to-wit: On AUG 30 1938 the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

Gen. No. 9310 Agenda No. 31

In the Appellate Court of Illinois

Second District

May Term, A. D. 1938

Eva Major Pinkham and Chasteen William Major,
Plaintiffs-Appellees,

vs.

George Pinkham; Ethel Lee Major; Red Cross Society of El Paso, Woodford County Illinois; First National Bank of El Paso, Illinois, a corporation; American National Red Cross, a corporation; the Salvation Army of Illinois, and the Salvation Army of Illinois, a corporation,
Defendants-Appellees,

Woodford County National Bank of El Paso, a corporation,
Intervening Petitioner-Appellant.

Appeal from the Circuit Court of Woodford County

WOLFE, J.

This is an appeal from the decree of the Circuit Court of Woodford County, construing the will of Horace Major, deceased, and denying the motion of the Woodford County National Bank of El Paso for leave to file an intervening petition. The decision of the court and the decree were based alone on the pleadings.

On March 29, 1937, Eva Major Pinkham and Chasteen William Major, plaintiffs, filed their bill in said court of Woodford County asking the court to construe the will of Horace Major, deceased. The bill is in the usual form and asks that certain parts of the will be construed by the court so that certain lands owned by Horace Major in his lifetime, might be declared to be the property of the petitioners.

On May 26, 1937, the appellant, the Woodford County National Bank, filed its petition asking that it be made a party to said proceedings. The petition alleges that in January, 1936, said bank recovered a judgment against Thomas V. Pinkham for the sum of $1,128.32; that said judgment is in full force and effect; that on September 16, 1920, said Thomas V. Pinkham conveyed to

Gen. No. 9210 Agenda No. 21

In the Appellate Court of Illinois

Second District

May Term, A. D. 1928

Eva Major Pinkham and Chesteen
William Major,
Plaintiffs-Appellees,

vs.

George Pinkham; Ezekel Lee Major; Red
Cross Society of Ft Hess, Woodford County
Illinois; First National Bank of Ft Hess,
Illinois, a corporation; American National
Red Cross, a corporation; the Salvation Army
of Illinois, and the Salvation Army of Ill-
inois, a corporation,
Defendants-Appellees,

Woodford County National Bank of Ft Hess,
a corporation,
Intervening Petitioner-Appellant.

Appeal from the
Circuit Court of
Woodford County

MOLFE, J.

This is an appeal from the decree of the Circuit Court of Woodford County, construing the will of Ezekel Major, deceased, and denying the motion of the Woodford County National Bank of Ft Hess for leave to file an intervening petition. The decision of the court and the decree were based alone on the pleadings.

On March 24, 1927, Eva Major Pinkham and Chesteen William Major, plaintiffs, filed their bill in said court of Woodford County asking the court to construe the will of George Major, deceased. The bill is in the usual form and says that certain parts of the will be construed by the court so that certain land owned by George Major in his lifetime, might be declared to be the property of the petitioners.

On May 26, 1927, the appellant, the Woodford County National Bank, filed its petition asking that it be made a party to said proceedings. The petition alleges that in January, 1926, said bank recovered a judgment against Thomas V. Pinkham for the sum of $1,128.25; that said judgment is in full force and effect; that on September 16, 1920, said Thomas V. Pinkham conveyed to

his father-in-law, Horace Major, the grantor's undivided 1/11th interest in 146½ acres in Woodford County; that plaintiff is informed and believes that said conveyance from Thomas V. Pinkham to Horace Major was for the purpose of defrauding the creditors of said Thomas V. Pinkham; that the same was a fraud upon said creditors and that by such conveyance said Pinkham was rendered insolvent and that the petitioner was prevented from collecting the said indebtedness; that said petitioner did not learn of said fraud until the will of Horace Major was probated and an inventory filed in said estate. The petition prays that the said Woodford National Bank be made a party to said proceedings and be permitted to file an answer and cross-complaint in said proceedings.

The court construed the will of the said Horane Major but refused to allow the appellant the right to file an intervening petition, and it is from this order denying the appellant to intervene that this appeal is prosecuted.

The appellant insists that the new Practice Act is applicable, to-wit, Section 24, Chapter 110, of the Statute of Illinois: "Joinder of defendants.) (1) Any person may be made a defendant who, either jointly, severally or in the alternative, is alleged to have or claim an interest in the controversy, or in any part thereof, or in the transactiom * * ." It claims that this amendment changes the old common law rule and is broad enough that the judge should have permitted the appellant to file an intervening petition in the litigation of its cause of action, in this proceeding. With this contention we cannot agree. In the case of Hairgrove v. City of Jacksonville, 366 Ill. 163, on page 184 the Supreme Court was discussing the right of the party to file an intervening petition and in their opinion use this langugge: "It seems clear from the facts shown that what was sought by this appellant was intervention in the proceedings

his father-in-law, Horace Major, the grantor's undivided 1/11th interest in 146½ acres in Woodford County; that plaintiff is informed and believes that said conveyance from Thomas V. Pinkham to Horace Major was for the purpose of defrauding the creditors of said Thomas V. Pinkham; that the same was a fraud upon said creditors and that by such conveyance said Pinkham was rendered insolvent and that the petitioner was prevented from collecting the said indebtedness; that said petitioner did not learn of said fraud until the will of Horace Major was probated and an inventory filed in said estate. The petition prays that the said Woodford National Bank be made a party to said proceedings and be permitted to file an answer and cross-complaint in said proceedings.

The court construed the will of the said Horace Major but refused to allow the appellant the right to file an intervening petition, and it is from this order denying the appellant to intervene that this appeal is prosecuted.

The appellant insists that the new Practice Act is applicable, to-wit, Section 24, Chapter 110, of the Statute of Illinois: "Joinder of defendants.) (1) Any person may be made a defendant who, either jointly, severally or in the alternative, is alleged to have or claim an interest in the controversy, or in any part thereof, or in the transaction * * ." It claims that this amendment changes the old common law rule and is broad enough that the judge should have permitted the appellant to file an intervening petition in the litigation of its cause of action, in this proceeding. With this contention we cannot agree. In the case of Hartgrove v. City of Jacksonville, 165 Ill. 165, on page 184 the Supreme Court was discussing the right of the party to file an intervening petition and in their opinion use this language: "It seems clear from the facts shown that what was sought by this appellant was intervention in the proceedings

to which it was not an original party. Under such facts one seeking to intervene must secure permission so to do. Such intervention will be granted or denied, depending upon the circumstances surrounding each case and the rules applicable thereto. The authority of the court to permit a person not made a party to a suit to intervene, exists only when a full and complete determination cannot be had without such person being made a party. (Bossert v. Drainage District, 307 Ill. 425). The right to intervene is not an absolute right and it has been held that where such intervention will result in the injection into a pending suit of issues which unduly complicate the case, intervention should be denied. (Ragland v. Wisrock, 61 Tex. 391; Houston Real Estate Co. v. Hechler, 44 Utah 64, 130 Pac. 1159). The rule pertaining to interventiom also is, that the intervenor must take the suit as he finds it. He is bound by the record of the case at the time of his intervention. He may neither change the issues between the parties nor raise new ones. He may not insist upon a change in the form of procedure nor delay the trial. (Wightman v. Evanstom Yaryan Co., 217 Ill. 371.) Under this rule the court did not err in denying this appellant's motion to intervene and become a party."

In order for the appellant to intervene in the present case, additional parties defendant must be brought into court, which would inject into the case new issues not involved in the petition filed to construe the will.

It will be observed that the intervening petition alleges that Pinkham transferred the property in question to Horace Major on September 16, 1920; that the bank did not take this judgment against Thomas V. Pinkham until January 13, 1926; that the bill for construing the will was filed March 29, 1937, and the appellant's petition was filed May 26, 1937, approximately 17 years after the transfer of ths property in question. In the case of Nelson v. Wilson, 331 Ill. 15, the Supreme Court discussing the question of laches have this to

to which it was not an original party. Under such facts one seeking to intervene must secure permission so to do. Such intervention will be granted or denied, depending upon the circumstances surrounding each case and the rules applicable thereto. The authority of the court to permit a person not made a party to a suit to intervene, exists only when a full and complete determination cannot be had without such person being made a party. (Bossert v. Tonkawa District, 207 Ill. 423). The right to intervene is not an absolute right and it has been held that where such intervention will result in the injection into a pending suit of issues which unduly complicate the case, intervention should be denied. (Ingland v. Tyrrell, 81 Fed. 321; Houston Real Estate Co. v. Cobler, 14 Ohio 64, 1150 Fed. 1150). The rule governing so intervention also is, that the intervenor must take the suit as he finds it. He is bound by the record of the case at the time of his intervention. He may neither change the issues tendered the parties nor raise new ones. He may not inject upon a cause in the form of proceedings nor delay the trial. (Lightman v. Evanston Express Co., 217 Ill. 271.) Under this rule the court did not err in denying this appellant's petition to intervene and become a party.'

In order for the appellant to intervene in the present case, additional parties defendant must be brought into court, which would inject into the case new issues not involved in the petition filed to construe the will.

It will be observed that the intervenor petition alleges that Lightman transferred the property in question to Forade Major on September 16, 1930; that the bank did not take this judgment against Thomas V. Lightman until January 13, 1926; that the bill for construing the will was filed March 19, 1927, and the appellant's petition was filed May 2, 1927, approximately 17 years after the transfer of the property in question. In the case of Falcon v. Wilson, 331 Ill. 26, the Supreme Court discussing the question of laches here this to

say: "Equity does not encourage or enforce stale claims. (Mckeen v. Grant, 268 Ill. 64). Mere lapse of time is no bar to equitable relief where a reasonable excuse for the delay appears from the bill. (Duncan v. Dazey, 318 Ill. 500; Moneta v. Hoffman, 249 id. 56; Middaugh v. Fox, 135 id. 344). A delay beyond the time fixed by the Statute of Limitations must be explained by averments in the bill before a complainant will be entitled to relief. (Totten v. Totten, 294 Ill. 70; Coryell v. Klehm, 157 id. 462; Harding v. Durand, 138 id. 515: Walker v. Ray, 111 id. 315). In Howe v. South Park Comrs. 119 Ill. 101, and Oliver v. Ross, 289 id. 624, it was held that the party who challenges the title of his adversary to real property must be diligent in discovering that which will avoid the title and render it invalid and must be diligent in his application for relief. Unreasonable delay, unexplained by equitable circumstances, has been held to be evidence of acquiescence and will bar relief. In McDearmon v. Burnham, 158 Ill. 55, it was held that good faith, conscience and reasonable diligence of the party seeking its relief are the elements that call a court of equity into activity. In the absence of these elements the court remains passive and declines to extend its relief or aid. It has always been the policy of the law to discountenance laches and neglect. In Collidge v. Rhodes, 199 Ill. 24, it was held that where the question of laches is involved, if there are facts which would put a person of ordinary prudence upon inquiry the complainant will be chargeable with such knowledge as could have been obtained by such inquiry."

It seems to us that a bank which has knowledge of ordinary business methods, and transacts business daily, should be reasonably diligent to ascertain whether this conveyance was fraudulent long before the time they filed their intervening petition, and the court did not err in refusing to grant them

say: "Equity does not encourage or enforce stale claims. (McKeen v. Grant, 288 Ill. 84). Mere laps of time is no bar to equitable relief where a reasonable excuse for the delay appears from the bill. (Duncan v. Bacon, 218 Ill. 500; Monks v. Hoffman, 240 id. 56; Middaugh v. Fox, 185 id. 344). A delay beyond the time fixed by the statute of limitations must be explained by averments in the bill before a complainant will be entitled to relief. (Thorsen v. Sotten, 224 Ill. 70; Dorvalk v. Klemm, 187 id. 452; Hardtke v. Durand, 138 id. 518; Walker v. Ray, 111 id. 318). In Howe v. South Park Comm. 118 Ill. 101, and Oliver v. Moss, 289 id. 524, it was held that the party who challenges the title of his adversary to real property must be diligent in discovering that which will avoid the title and render it invalid and must be diligent in his application for relief. Unreasonable delay, unexplained by equitable circumstances, has been held to be evidence of acquiescence and will bar relief. In McCarron v. Burnham, 158 Ill. 55, it was held that good faith, conscience and reasonable diligence of the party seeking the relief are the elements that call a court of equity into activity. In the absence of these elements the court remains passive and declines to extend its relief or aid. It has always been the policy of the law to discountenance laches and neglect. In Coffing v. Rhodes, 129 Ill. 24, it was held that where the question of laches is involved, if there are facts which would put a person of ordinary prudence upon inquiry the complainant will be chargeable with such knowledge as could have been obtained by such inquiry."

It seems to us that a bank which has knowledge of ordinary business methods, and transacts business daily, should be reasonably diligent to ascertain whether this conveyance was fraudulent long before the time they filed their intervening petition, and the court did not err in refusing to grant them

the right to intervene since they were guilty of laches.

The judgment of the Circuit Court of Woodford County, Illinois, is hereby affirmed.

Judgment affirmed.

the right to intervene since they were guilty of laches.

The judgment of the Circuit Court of Rockford County, Illinois, is hereby affirmed.

Judgment affirmed.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32) 7

93-4

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 3rd day of May, in the year of our Lord one thousand nine hundred and thirty-eight, within and for the Second District of the State of Illinois:

Present -- The Hon. FRANKLIN R. DOVE, Presiding Justice
Hon. FRED G. WOLFE, Justice
Hon. BLAINE HUFFMAN, Justice
JUSTUS L. JOHNSON, Clerk
RALPH H. DESPER, Sheriff

BE IT REMEMBERED, that afterwards, to-wit: On [illegible] the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

Gen. No. 9324 Agenda No. 19

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

MAY TERM, A. D. 1938.

Stanley Williamson,
Plaintiff-Appellee,

vs.

Walter I. Jones, as administrator of the Estate of Charles W. Hart, Deceased,
Defendant-Appellant

Appeal from the Circuit Court of Will County, Illinois.

WOLFE, J.

This is an appeal by Walter I. Jones, as administrator of the Estate of Charles W. Hart, deceased, from a judgment of the Circuit Court of Will County, Illinois, allowing a claim of Stanley Williamson, appellee, for the sum of $3,000.00. The claim was filed in the Probate Court against said estate. On a hearing in said court the claim was disallowed. The appellee appealed to the Circuit Court of Will County. A hearing was had on the same before the court without a jury, and the claim allowed for the sum of $3,000.00. The claim is for work, labor, and services performed for Charles W. Hart, from January 27, 1929, to January 27, 1934, for the sum of $5,000.00. It is from the order allowing the claim of $3,000.00 that the appeal to this Court is prosecuted.

Irene Walsh, a witness called on behalf of the claimant, testified that she had known Mr. Hart in his lifetime, and also had known Stanley Williamson for a number of years; that Stanley Williamson frequently worked about the yard and home of Charles W. Hart, doing different kinds of labor. She detailed the kind of work she had seen him doing in and around the Hart home. She further testified that she had had a conversation with Mr. Hart about Stanley Williamson and the work he was doing for Mr. Hart, and that Mr. Hart stated to her that he was going to pay Stanley for the work, and that he owed him for the work that he had done.

Gen. No. 9324 Agenda No. 10

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

MAY TERM, A. D. 1928.

Stanley Williamson,
Plaintiff-Appellee,

Appeal from the Circuit
Court of Will County,
Illinois.

vs.

Walter I. Jones, as administrator
of the Estate of Charles W. Hart,
Deceased,
Defendant-Appellant

MULKEY, J.

This is an appeal by Walter I. Jones, as administrator of the Estate of Charles W. Hart, deceased, from a judgment of the Circuit Court of Will County, Illinois, allowing a claim of Stanley Williamson, appellee, for the sum of $3,000.00. The claim was filed in the Probate Court against said estate. On a hearing in said court the claim was disallowed. The appellee appealed to the Circuit Court of Will County. A hearing was had on the same before the court without a jury, and the claim allowed for the sum of $3,000.00. The claim is for work, labor, and services performed for Charles W. Hart, from January 27, 1922, to January 27, 1924, for the sum of $3,000.00. It is from the order allowing the claim of $3,000.00 that the appeal to this Court is prosecuted.

Irene Walsh, a witness called on behalf of the claimant, testified that she had known Mr. Hart in his lifetime, and also had known Stanley Williamson for a number of years; that Stanley Williamson frequently worked about the yard and home of Charles W. Hart, doing different kinds of labor. She detailed the kind of work she had seen him doing in and around the Hart home. She further testified that she had had a conversation with Mr. Hart about Stanley Williamson and the work he was doing for Mr. Hart, and that Mr. Hart stated to her that he was going to pay Stanley for the work, and that he owed him for the work that he had done.

Ambrose Walsh, a witness called on behalf of the appellee, testified that he had known Mr. Hart and Stanley Williamson for a number of years, and had lived close neighbors to Mr. Hart; that he had frequently seen the claimant, Mr. Williamson, at work at the home of Mr. Hart; that he had talked with Mr. Hart every day for the past five years or more; that he had seen Stanley Williamson fixing the windows and doing general work around the place and saw him working on the garage; that he repaired the garage by putting on a new roof; that he had seen him painting and hanging wall-paper and putting up stoves and taking them down; that he took Mr. Hart different places in his automobile, and that he had done a lot of things around the house for Mr. Hart continuously for five years before Mr. Hart's death; that he had frequently conversed with Mr. Hart concerning Mr. Williamson's services and as to whether he was to be paid for his work or not. Mr. Hart's answer was, "He always told me, he said he owed Stanley, 'I am going to pay him; I haven't the money now, but I am going to pay Stanley.' That as soon as things could be straightened out he would pay him; that he was pressed for money at that time."

Glenn E. Olson, a witness called in behalf of the plaintiff, testified that he had known Mr. Charles E. Hart for a long time; also was acquainted with Stanley Williamson; that he visited Mr. Hart in a business and social way many times, and that on various occasions Mr. Hart said that Stanley Williamson was his best friend, a pal; that he did the work around the house and did a lot of things for him and that he was going to pay Stanley.

Frank Drehr, another witness called in behalf of the plaintiff, testified that he had known Mr. Hart and Mr. Williamson; that he had a conversation with Mr. Hart about Mr. Williamson working for him and that Mr. Hart said he wanted Williamson to come and do some work and that he always comes up there to work and that he will be paid for it.

Forence Brown, another witness called in behalf of the plaintiff, testified that she had known Hart and Williamson for the past 16

Lenorse Kalab, a witness called on behalf of the appellee, testified that he had known Mr. Hart and Stanley Williamson for a number of years, and had lived close neighbors to Mr. Hart; that he had frequently seen the claimant, Mr. Williamson, at work at the home of Mr. Hart; that he had talked with Mr. Hart every day for the past five years or more; that he had seen Stanley Williamson fixing the windows and doing general work around the place and saw him working on the garage; that he repaired the garage by putting on a new roof; that he had seen him painting and hanging wall-paper and putting up stoves and taking them down; that he took Mr. Hart different places in his automobile, and that he had done a lot of things around the house for Mr. Hart continuously for five years before Mr. Hart's death; that he had frequently conversed with Mr. Hart concerning Mr. Williamson's services and as to whether he was to be paid for his work or not. Mr. Hart's answer was, "He always told me, he said he owed Stanley, 'I am going to pay him; I haven't the money now, but I am going to pay Stanley.' That as soon as things could be straightened out he would pay him; that he was pinched for money at that time."

Glenn E. Olson, a witness called in behalf of the plaintiff, testified that he had known Mr. Charles E. Hart for a long time; also was acquainted with Stanley Williamson; that he visited Mr. Hart in a business and social way many times, and that on various occasions Mr. Hart said that Stanley Williamson was his best friend, a pal; that he did the work around the house and did a lot of things for him and that he was going to pay Stanley.

Frank Drenk, another witness called in behalf of the plaintiff, testified that he had known Mr. Hart and Mr. Williamson; that he had a conversation with Mr. Hart about Mr. Williamson working for him and that Mr. Hart said he wanted Williamson to come and do some work and that he always comes up there to work and that he will be paid for it.

Florence Brown, another witness called in behalf of the plaintiff, testified that she had known Hart and Williamson for the past 15

years; that prior to 1934 she saw the claimant at Mr. Hart's home most every day for the last 5 years prior to the death of Hart; that he worked at the Hart place, papered the walls, fixed up the yard, fixed the furnace, repaired the sidewalk, shoveled snow, spaded the garden, roofed the barn, roofed the shed; that Mr. Hart was in the insurance business and claimant took him around to individuals here and there and also to Ridgewood for collections; and around in Joliet Township, and also took him to dinner on Sundays in his own home, and for rides and fishing; that in her opinion for the past five years he was at Mr. Hart's home doing something for him everyday. This witness details other items of work that she had seen Williamson doing for Mr. Hart. She further testified, "I had a conversation with Mr. Hart concerning Stanley Williamson, during the last five years prior to his death. He would always tell me how good Stanley was to him, and that he owed him and he intended to pay him." She said, "I knew he was doing a lot of work."

Several witnesses testified that in their opinion the reasonable value of such services as had been rendered by Williamson to Hart was worth from $100.00 to $115.00 per month. Therewas no objection offered to this testimony. The defense called Anna D. Krings as a witness, who is a Court reporter in the Probate Court of Will County. She identified some documents that contained the evidence of several witnesses in the trial before the Probate Court. This evidence was introduced as tending to impeach the witness Florence Brown. The defense offered no other testimony.

At the close of all the evidence the defendant submitted to the court ten propositions of law. The First, Seventh, Eighth and Tenth propositions were marked "Refused", the others, "Accepted." The appellant assigns as error that the court erred in refusing to hold the law applicable to the case as set forth in the propositions of law which he marked "Refused", and that the court also erred in allowing the claim and rendering judgment in favor of the appellee because the evidence does not support, nor does the law warrant, the amount allowed, or any amount whatsoever. The appellee has assigned cross-

years; that prior to 1934 she saw the claimant at Mr. Hart's home most every day for the last 3 years prior to the death of Hart; that he worked at the hart place, repaired the walls, fixed up the yard, fixed the furnace, repaired the sidewalk, traveled some, spaded the garden, roofed the barn, roofed the shed; that Mr. Hart was in the insurance business and claimant took him around to individuals here and there and also to Ridgewood for collections; and around in Joliet Township, and also took him to dinner on Sundays in his own home, and for rides and fishing; that in her opinion for the past five years he was at Mr. Hart's home doing something for him everyday. This witness details other items of work that she had seen Williamson doing for Mr. Hart. She further testified, "I had a conversation with Mr. Hart concerning Stanley Williamson, during the last five years prior to his death. He would always tell me how good Stanley was to him, and that he owes him and he intended to pay him." She said, "I knew he was doing a lot of work."

Several witnesses testified that in their opinion the reasonable value of such services as had been rendered by Williamson to Hart was worth from $100.00 to $125.00 per month. There was no objection offered to this testimony. The defense called Ann D. Kinney as a witness, who is a court reporter in the Probate Court of Will County. She identified some documents that contained the evidence of several witnesses in the trial before the Probate Court. This evidence was introduced as tending to impeach the witness Florence Brown. The defense offered no other testimony.

At the close of all the evidence the defendant submitted to the court ten propositions of law. The first, seventh, eighth and tenth propositions were marked "Refused", the others, "Accepted." The appellant assigns as error that the court erred in refusing to hold the law applicable to the case as set forth in the propositions of law which be marked "Refused", and that the court also erred in allowing the claim and rendering judgment in favor of the appellee because the evidence does not support, nor does the law warrant, the amount allowed, or any amount whatsoever. The appellee has assigned cross-

error in that the court erred in allowing the claim for only $3,000.00 when the undisputed evidence shows he is entitled to $5,000.00.

Our Supreme Court and Appellate Courts have each had occasions to pass upon the questions of law relative to this case and they are pretty well settled in regard thereto. In the case of Brooks vs. Ostrander, 158 Ill. App., 78, this court had occasion to discuss practically the same question as presented in the present case and we there held that if services are rendered by one member of a family to another, the mere fact of rendering service will not raise an implied contract to pay for such services. There must be other evidence from which a contract may be inferred. In the present case it is undisputed that Stanley Williamson was a nephew of Charles W. Hart, deceased, A promise to pay could not be inferred from the fact that he performed labor for the deceased in his lifetime, but must be proven by competent wx evidence that at the time the services were rendered, the claimant expected to be paid and that Charles W. Hart intended to pay for the same. In such cases the claimant is not a competent witness in his own behalf and under such circumstances it is competent to admit any testimony that tends to prove the facts at issue in the case. One of the latest expressions of the Supreme Court on this subject is the case of Moreen vs. Estate of Carlson, 365 Ill., 482. On page 493 we find the following: "The question remains, whether the plaintiff was entitled to recover for the services rendered Carlson during the year preceding his death on a quantum meruit basis. It is proper to permit a quantum meruit recovery on a claim made under an express contract. (Sussdorf v. Schmidt, 55 N.Y. 223; Canet v. Smith, 173 App. Div. 241, 159 N.Y. Supp. 593; 13 Corpus Juris, 750; People's Casualty Claim Adjustment Co. v. Darrow, 172 Ill. 62). In Anderson v. Biesman & Carrick Co., 287 Ill. App. 507, (decided since the rendition of its opinion in the present case,) the same division of the Appellate Court has reached a like conclusion supported by subdivision three of section 33 and section 42 of the Civil Practice act. To recover on a quantum meruit basis it was not essential to prove a specific contract and plaintiff's failure to establish the oral contract is immaterial. It was only required

error in that the court erred in allowing the claim for only $3,000.00 when the undisputed evidence shows he is entitled to $5,000.00.

Our Supreme Court and Appellate Courts have seen and occasions to pass upon the questions of law relative to this case and they are pretty well settled in regard thereto. In the case of Brooks vs. Ostrander, 158 Ill. App., 78, this court had occasion to discuss practically the same question as presented in the present case and we there held that if services are rendered by one member of a family to another, the mere fact of rendering service will not raise an implied contract to pay for such services. There must be other evidence from which a contract may be inferred. In the present case it is undisputed that Stanley Williamson was a nephew of Charles W. Hart, deceased. A promise to pay could not be inferred from the fact that he performed labor for the deceased in his lifetime, but must be proven by competent evidence that at the time the services were rendered, the claimant expected to be paid and that Charles W. Hart intended to pay for the same. In such cases the claimant is not a competent witness in his own behalf and under such circumstances is competent to admit any testimony that tends to prove the facts at issue in the case. One of the latest expressions of the Supreme Court on this subject is the case of Moreen vs. Estate of Carlson, 388 Ill., 482. On page 489 we find the following: "The question remains, whether the plaintiff was entitled to recover for the services rendered Carlson during the year preceding his death on a quantum meruit basis. It is proper to permit a quantum meruit recovery on a claim made under an express contract. (Sunsdorf v. Schmidt, 33 N.Y. 223; Cumet v. Smith, 173 App. Div. 241, 159 N.Y. App. 393; 13 Corpus Juris, 730; Peoples Casualty Claim Adjustment Co. v. Barrow, 172 Ill. App. 82). In Anderson v. Hessler & Service Co., 207 Ill. App. 507, (decided since the rendition of its opinion in the present case,) the same division of the Appellate Court has reached a like conclusion supported by subdivision three of section 33 and section 42 of the Civil Practice Act. To recover on a quantum meruit basis it was not essential to prove a specific contract and plaintiff's failure to establish the oral contract is immaterial. It was only required

that she produce sufficient evidence of a contract, express or implied, to negative any presumption that her services were gratuitously performed. The evidence previously narrated abundantly discloses that both the rendition and acceptance of the services were under an express or implied understanding that they should be compensated for and that they were not rendered for love and affection. It follows that the trial court properly held that the plaintiff was entitled to a recovery on a quantum meruit basis."

From an examination of the evidence introduced in this case it is our conclusion that the plaintiff has established the fact that at the time he rendered the services in question the deceased, Charles W. Hart, intended to pay him for the same and under the circumstances the claimant, Stanley Williamson is entitled to recover the reasonable value for such services.

We do not deem it necessary to call attention specifically to the refused propositions at law as tendered by the defense, except that the propositions that the court marked "Accepted", fully presented the questions of law applicable to the case. There was no error in marking the refused ones "Refused."

The appellee has assigned cross-error that the court should have allowed $5,000.00 on the claim instead of $3,000.00. From the amount of labor performed by the claimant for the deceased, as disclosed by the evidence, it is our conclusion that the trial court made a very liberal allowance for the claimant. Cross-error is hereby overruled.

We find no reversible error in the case and the judgment of the trial court is affirmed.

Judgment affirmed.

that she produce sufficient evidence of a contract, express or implied, to rebutt any presumption that her services were gratuitously performed. The evidence previously narrated abundantly discloses that both the rendition and acceptance of the services were under an express or implied understanding that they should be compensated for and that they were not rendered for love and affection. It follows that the trial court properly held that the plaintiff was entitled to a recovery on a quantum meruit basis."

From an examination of the evidence introduced in this case it is our conclusion that the plaintiff has established the fact that at the time he rendered the services in question the deceased, Charles E. Hart, intended to pay him for the same and under the circumstances the claimant, Stanley Williamson is entitled to recover the reasonable value for such services.

We do not deem it necessary to call attention specifically to the refused propositions of law as designated by the defense, except that the propositions that the court marked "Accepted", fully presented the questions of law applicable to the case. There was no error in marking the refused ones "Refused."

The appellee has assigned cross-error that the court should have allowed $2,000.00 on the claim instead of $3,000.00. From the amount of labor performed by the claimant for the deceased, as disclosed by the evidence, it is our conclusion that the trial court made a very liberal allowance for the claimant. Cross-error is hereby overruled.

We find no reversible error in the case and the judgment of the trial court is affirmed.

Judgment affirmed.

STATE OF ILLINOIS, }ss.
SECOND DISTRICT

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32) 7

9332

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 3rd day of May, in the year of our Lord one thousand nine hundred and thirty-eight, within and for the Second District of the State of Illinois:

Present -- The Hon. FRANKLIN R. DOVE, Presiding Justice
Hon. FRED G. WOLFE, Justice
Hon. BLAINE HUFFMAN, Justice
JUSTUS L. JOHNSON, Clerk
RALPH H. DESPER, Sheriff

296 I.A. 650

BE IT REMEMBERED, that afterwards, to-wit: On SEP 15 1938 the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

General No. 9332 Agenda No. 25

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

May Term, A. D. 1938

Hallie Kelley,
(Plaintiff) Appellee,

vs.

Theodore O. Miles, or in the alternative, Frank Sutor,
Defendants

On Appeal of
Theodore O. Miles
(Defendant) Appellant.

Appeal from the Circuit Court of Knox County.

WOLFE--J.

On November 27, 1934, Hallie Kelley, the appellee, started a suit in the Circuit Court of Knox County, Illinois, against Theodore O. Miles, or in the alternative, Frank Sutor, for alleged damages she sustained in a collision between the automobile in which she was riding and a truck of the defendant Theodore O. Miles. The petition consists of three counts and alleges that the plaintiff with all due care and caution for her own safety was riding in a car driven by one Thomas Gagg upon and along a paved road, State Highway No. 91, near Knoxville, Illinois, on the 18th of October, 1934; that the car in which she was riding was traveling at a speed of not more than forty miles per hour, and following and in the rear of the motor truck of the defendant which was proceeding in the same direction as the automobile driven by Thomas Gagg; that the truck was being driven by one Dell Shafman, who was the agent or servant of Theodore O. Miles, and he likewise was driving at a rate of speed of not more than forty miles per hour; that said Theodore O. Miles, by Dell Shafman, his agent and servant for that purpose, was driving and operating said truck on said highway in a careless, reckless, and negligent manner and without proper or due regard for the safety of others.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

May Term, A. D. 1935

Hallie Hailey,
(Plaintiff) Appellee,

vs.

Theodore O. Miles, or in the alternative, Frank Sutor,
Defendants

On Appeal of
Theodore O. Miles
(Defendant) Appellant.

Appeal from the Circuit Court of Lake County.

WOLFE--J.

On November 27, 1934, Hallie Hailey, the appellee, started a suit in the Circuit Court of Lake County, Illinois, against Theodore O. Miles, or in the alternative, Frank Sutor, for alleged damages she sustained in a collision between the automobile in which she was riding and a truck of the defendant Theodore O. Miles. The petition consists of three counts and alleges that the plaintiff with all due care and caution for her own safety was riding in a car driven by one Thomas Gage upon and along a paved road, State Highway No. 91, near Zion, Illinois, on the 15th of October, 1934; that the car in which she was riding was traveling at a speed of not more than forty miles per hour, and following and in the rear of the motor truck of the defendant which was proceeding in the same direction as the automobile driven by Thomas Gage; that the truck was being driven by one Dell Sheffer, who was the agent or servant of Theodore O. Miles, and he likewise was driving at a rate of speed of not more than forty miles per hour; that said Theodore O. Miles, by Dell Sheffer, his agent and servant for that purpose, was driving and operating said truck on said highway in a careless, reckless, and negligent manner and without proper or due regard for the safety of others.

The petition further alleges, "that the said Dell Shafman, the agent and servant of the defendant, Theodore O. Miles, or in the alternative Frank Sutor, with the intention, as plaintiff is informed and believes, of turning into a private road or driveway leading north from said State Highway, without warning or signal of any kind, turned left across said State Highway No. 91 and directly across the path of the automobile in which complainant was riding and by reason of the failure of the said defendant to signal his intention of so turning to the left across said State Highway, the automobile in which the plaintiff was riding ran into and struck the side of said motor truck with great force and violence; that as a direct and proximate result of the careless, negligent and reckless driving of said motor truck by the said defendant, the plaintiff was then and there greatly injured."

Count two is practically the same as count one, with the exception of the charge of negligence of the defendant, which is as follows: "That said Thomas Gagg, in whose automobile the plaintiff was riding, and which said automobile was following closely in the rear of the motor truck or motor vehicle driven and operated by the defendant, swung out to his left and upon the northerly portion of said State Highway No. 91, with the intention of passing the motor truck so operated and driven by the said defendant, but the said defendant, negligently, recklessly and carelessly, and without warning or signal of any kind, suddenly swung, drove and operated the motor truck, then and there by him driven and operated toward his left and toward the entrance of said private drive, and, by reason of his negligence as aforesaid, placed the said motor truck directly in front of the automobile in which plaintiff was riding, causing the automobile in which plaintiff was riding to come into violent contact, with said motor truck, resulting in a foreeful and violent collision of the said automobile in which the plaintiff was riding and the motor truck being driven by the said Dell Shafman, the agent and servant of the defendant Theodore O. Miles, or in the alternative the agent and servant of the defendant Frank Sutor."

The petition further alleges, "that the said Bell Anderson, the agent and servant of the defendant, Theodore O. Miles, or in the alternative Frank Sutor, with the intention, as plaintiff is informed and believes, of turning into a private road or driveway leading north from said State Highway, without warning or signal of any kind, turned left across said State Highway No. 91 and directly across the path of the automobile in which complainant was riding and by reason of the failure of the said defendant to signal his intention of so turning to the left across said State Highway, the automobile in which the plaintiff was riding ran into and struck the side of said motor truck with great force and violence; that as a direct and proximate result of the careless, negligent and reckless driving of said motor truck by the said defendant, the plaintiff was then and there greatly injured."

Count two is practically the same as count one, with the exception of the charge of negligence of the defendant, which is as follows: "That said Thomas Gage, in whose automobile the plaintiff was riding, and which said automobile was following closely in the rear of the motor truck or motor vehicle driven and operated by the defendant, swung out to his left and upon the northerly portion of said State Highway No. 91, with the intention of passing the motor truck so operated and driven by the said defendant, but the said defendant, negligently, recklessly and carelessly, and without warning or signal of any kind, suddenly swung, drove and operated the motor truck, then and there by him driven and operated toward his left and toward the entrance of said private drive, and, by reason of his negligence as aforesaid, placed the said motor truck directly in front of the automobile in which plaintiff was riding, causing the automobile in which plaintiff was riding to come into violent contact, with said motor truck, resulting in a forceful and violent collision of the said automobile in which the plaintiff was riding and the motor truck being driven by the said Bell Anderson, the agent and servant of the defendant Theodore O. Miles, or in the alternative the agent and servant of the defendant Frank Sutor."

Count three is the same as counts one and two with the exception of the charge of negligence, and is as follows: "That at the time and place aforesaid, the said State Highway No. 91 was one of the duly designated State Highways of the State of Illinois, and that there was then and there in full force a certain statute of the State of Illinois, which is known and designated as Paragraph 5 of Section 234 of Chapter 121 (Smith-Hurd Revised Statutes, 1933) and which is as follows: 'No driver of a vehicle shall suddenly stop or slow down without first signalling his intention with outstretched arm or otherwise to those following closely in the rear nor shall he turn without signalling in a similar manner both to those following closely and those approaching from the opposite direction,' and that the said defendant then and there carelessly and negligently and in violation of said statute failed to signal his intention of turning with outstretched arm as required by statute."

The answer of the defendant Miles denies that plaintiff was in the exercise of due care and caution for her own safety; denies that the car of Gagg was being driven in a careful manner at a speed of not more than forty miles an hour; and denies that at the time of the accident that Dell Shafman was driving said truck as an agent or servant of the defendant Theodore O. Miles. The plaintiff amended Paragraph 2 of Count 2 of her amended complaint in which she alleges that Thomas Gagg at the time and place in question in attempting to pass the truck of the defendant, swung out and turned to the left upon the northern portion of the highway with the intention of passing the truck which was operated and driven by the defendant, by his agent, and the defendant by said agent, negligently, recklessly, and carelessly, and without warning or signal of any kind suddenly swung, drove, and operated said motor truck to his left across and upon the northern portion of said highway and towards the entrance of a private driveway, and by reason of his directing the truck across to the driveway, negligently placed said truck directly in front of the

Count three is the same as counts one and two with the exception of the charge of negligence, and is as follows: "That at the time and place aforesaid, the said State Highway No. 21 was one of the duly designated State Highways of the State of Illinois, and that there was then and there in full force a certain statute of the State of Illinois, which is known and designated as Paragraph 2 of Section 2(b) of Chapter 121 (Smith-Hurd Revised Statutes, 1933) and which is as follows: 'No driver of a vehicle shall suddenly stop or slow down without first signalling his intention with outstretched arm or otherwise to those following closely in the rear nor shall he turn without signalling in a similar manner both to those following closely and those approaching from the opposite direction,' and that the said defendant then and there carelessly and negligently and in violation of said statute failed to signal his intention of turning with outstretched arm as required by statute."

The answer of the defendant Miles denies that plaintiff was in the exercise of due care and caution for her own safety; denies that the car of Gage was being driven in a careful manner at a speed of not more than forty miles an hour; and denies that at the time of the accident that Dell Oberson was driving said truck as an agent or servant of the defendant Theodore O. Miles. The plaintiff amended Paragraph 2 of Count 2 as her amended complaint in which she alleges that Thomas Gage at the time and place in question in attempting to pass the truck of the defendant, swung out and turned to the left upon the northern portion of the highway with the intention of passing the truck which was operated and driven by the defendant, by his agent, and the defendant by said agent, negligently, recklessly, and carelessly, and without warning or signal of any kind suddenly swerved, drove, and operated said motor truck to his left across and upon the northern portion of said highway and towards the entrance of a private driveway, and by reason of his directing the truck across to the driveway, negligently placed said truck directly in front of the

automobile in which the plaintiff was riding and caused the accident complained of.

Plaintiff alleges that by reasons of this carelessness and negligence of the defendant, the collision occurred and she was greatly injured and damaged. Each of the defendants filed answers, but at the conclusion of the testimony the suit was dismissed as to Frank Sutor, so the only defendant is Theodore O. Miles, and the answer of Sutor is deleted.

The case was tried before a jury which found the issues in favor of the plaintiff and assessed her damages at $3,500.00. The defendant filed a motion for a new trial setting forth a number of reasons for the same. This motion was overruled and judgment was entered on the verdict in favor of the plaintiff for $3,500.00 and it is from this judgment that the appellant, Theodore O. Miles is prosecuting this appeal.

The appellee testified in her own behalf and the persons that were with her in the automobile at the time of the accident gave their version as to how the accident occurred. Dell Shafman, driver of the truck in question, and R. D. Sandall, who was standing near a corn crib when he saw the accident occur, testified as to what he saw at the time of the accident. Also witnesses were called in regard to the injuries to the plaintiff. Thomas Gagg, one of the plaintiff's witnesses, testified that the car in which the plaintiff was riding was being driven in a careful manner along the state highway in question; that as they approached an intersection they saw the driver of the defendant's truck drive upon the paved road and turn east in the same direction in which the Gagg car was being driven; that as they approached the truck, Gagg pulled to the left and sounded his horn several times and gave notice of his intention to pass the truck; that he was driving at a rate of speed of approximately 40 miles an hour; that he sounded his horn the first time at a distance of approximately 250 feet back of the truck; that he continued sounding his horn, but the truck without any warning from its driver turned across the hard road in front of the automobile

automobile in which the plaintiff was riding and caused the accident complained of.

Plaintiff alleges that by reason of this carelessness and negligence of the defendant, the collision occurred and she was greatly injured and damaged. Each of the defendants filed answer, but at the conclusion of the testimony the suit was dismissed as to Frank Sutor, so the only defendant is Theodore C. Miles, and the answer of Sutor is deleted.

The case was tried before a jury which found the issues in favor of the plaintiff and assessed her damages at $2,500.00. The defendant filed a motion for a new trial setting forth a number of reasons for the same. This motion was overruled and judgment was entered on the verdict in favor of the plaintiff for $2,500.00 and it is from this judgment that the appellant, Theodore C. Miles is prosecuting this appeal.

The appellee testified in her own behalf and the persons that were with her in the automobile at the time of the accident gave their version as to how the accident occurred. Neil Eberson, driver of the truck in question, and R. D. Sandell, who was standing near a corn crib when he saw the accident occur, testified as to what he saw at the time of the accident. Also witnesses were called in regard to the injuries to the plaintiff. Thomas Gage, one of the plaintiff's witnesses, testified that the car in which the plaintiff was riding was being driven in a careful manner along the state highway in question; that as they approached an intersection they saw the driver of the defendant's truck drive upon the paved road and turn east in the same direction in which the Gage car was being driven; that as they approached the truck, Gage pulled to the left and sounded his horn several times and gave notice of his intention to pass the truck; that he was driving at a rate of speed of approximately 40 miles an hour; that he sounded his horn the first time at a distance of approximately 250 feet back of the truck; that he continued sounding his horn, but the truck without any warning from its driver turned across the hard road in front of the automobile

and the accident occurred. The testimony of the other occupants of the car was practically the same as Mr. Gagg's.

Dell Shafman, the driver of the truck, testified that before he started to turn across the road he looked in the mirror and saw no one approaching; that he stuck his hand out of the left-hand side of the truck after he had gone eight or nine rods east of the intersection; that he left his hand out for a distance of a rod or so; that the maximum speed of his truck was 15 miles an hour; that he did not hear the sound of any horn before he turned.

Mr. Sandall testified that he saw the truck approaching the hard road; that he saw a car coming east on the hard road, about 100 to 110 rods west of the intersection; that the truck pulled onto the pavement and went east, proceeding on the south side of the pavement; that after the truck had gone about five rods east on the hard road, the driver put his hand out of the left side of the cab to signal; that his hand was out for the time it took the truck to go a distance of about one rod; that the driver of the truck then drew his hand in and began to pull across the pavement to the north; that just before the truck started to cross the pavement it was on the right-hand or south side of the slab.

If Dell Shafman and Mr. Sandall are correct in the time that Shafman held his hand out to signal that he intended to make the turn across the pavement to the left, and the truck was being driven at the rate of 15 miles an hour, the length of time consumed in giving the signal would be less than one second. The jury heard the evidence and had an opportunity to observe the witnesses upon the stand and it is their duty to decide which witness is more worthy of belief. They found the issues in favor of the plaintiff.

After reading the evidence as abstracted it is our conclusion that the preponderance of the evidence is in favor of the plaintiff; that the accident was caused by the negligence of the driver of the defendant's truck; and that the plaintiff was in the exercise of due care and caution for her own safety at the time of the accident.

and the accident occurred. The testimony of the other occupants of the car was practically the same as Mr. Begg's.

Dell Shafman, the driver of the truck, testified that before he started to turn across the road he looked in the mirror and saw no one approaching; that he stuck his hand out of the left-hand side of the truck after he had gone eight or nine rods east of the intersection; that he left his hand out for a distance of a rod or so; that the maximum speed of his truck was 15 miles an hour; that he did not hear the sound of any horn before he turned.

Mr. Sandell testified that he saw the truck approaching the main road; that he saw a car coming east on the main road, about 100 to 110 rods east of the intersection; that the truck pulled onto the pavement and went west, proceeding on the south side of the pavement; that after the truck had gone about five rods west on the main road, the driver put his hand out of the left side of the cab to signal; that his hand was out for the time it took the truck to go a distance of about one rod; that the driver of the truck then drew his hand in and began to pull across the pavement to the north; that just before the truck started to cross the pavement it was on the right-hand or south side of the slab.

If Dell Shafman and Mr. Sandell are correct in the time that Shafman held his hand out to signal that he intended to make the turn across the pavement to the left, and the truck was being driven at the rate of 15 miles an hour, the length of time consumed in giving the signal would be less than one second. The jury heard the evidence and had an opportunity to observe the witnesses upon the stand and it is their duty to decide which witness is more worthy of belief. They found the issues in favor of the plaintiff.

After reading the evidence as abstracted it is our conclusion that the preponderance of the evidence is in favor of the plaintiff; that the accident was caused by the negligence of the driver of the defendant's truck; and that the plaintiff was in the exercise of due care and caution for her own safety at the time of the accident.

It is insisted by the appellant that the verdict of the jury is the result of sympathy, passion, and prejudice, and is not based on competent evidence. His complaint in this matter is that the plaintiff tried to introduce in evidence a plaster cast which the doctor had placed upon the injured knee of the plaintiff at the time he treated her for her injuries. The witness who was called to identify this cast was Mrs. John Belt. Her testimony was that the cast in question was the one worn by the plaintiff, Mrs. Hallie Kelley. Then upon objection of the defendant's attorney, the exhibit was withdrawn. The appellant in his argument states that the plaintiff again tried to introduce the plaster cast in evidence when Dr. McClanahan was called as a witness. On examination of the doctor's testimony as abstracted it does not disclose that any such attempt was made to introduce this exhibit. We do not see how any attempt to introduce this exhibit in evidence could prejudice the jury against the defendant.

Complaint is made that the plaintiff's given instruction No. 1 directs a verdict for the plaintiff, and all the facts necessary to be proven to entitle the plaintiff to recover were not stated and does not include all the material elements necessary for a directed verdict. Therefore the instruction is fatally defective and cannot be cured by other instructions in the case and the judgment should be reversed for this reason alone. This instruction does not direct a verdict or direct a recovery for the plaintiff and does not ~~direct~~ attempt to set forth the facts for such purpose. This instruction is merely for the purpose of stating the law relative to the facts necessary to be proven in regard to establishing the fact that Dell Shafman was driving the truck at the time of the accident in question as agent and servant of the defendant, Theodore O. Miles. We think that this instruction is a fair statement of the law relative to this case.

Complaint is also made that instruction No. 8 given in behalf of the plaintiff is fatally defective and therefore should not have been given. The abstract and record discloses that the defendant

It is insisted by the appellant that the verdict of the jury is the result of sympathy, passion, and prejudice, and is not based on competent evidence. The complaint in this matter is that the plaintiff tried to introduce in evidence a plaster cast which the doctor had placed upon the injured knee of the plaintiff at the time he treated her for her injuries. The witness who was called to identify this cast was Mrs. John Smith. Her testimony was that the cast in question was the one worn by the plaintiff, Mrs. Hallie Bailey. Upon objection of the defendant's attorney, the exhibit was withdrawn. The appellant in his argument asserts that the plaintiff could have introduce the plaster cast in evidence when Dr. Coleman was called as a witness. On examination of the doctor's testimony, he identified it does not disclose that any such attempt was made to introduce this exhibit. We do not see how any attempt to introduce this exhibit in evidence could prejudice the jury against the defendant.

Complaint is made that the plaintiff's given instruction No. 1 directs a verdict for the plaintiff, and all the facts necessary to be proven to entitle the plaintiff to recover were not stated and does not include all the material elements necessary for a directed verdict. Therefore the instruction is totally defective and cannot be cured by other instructions in the case and the judgment should be reversed for this reason alone. This instruction does not direct a verdict or direct a recovery for the plaintiff and does not even attempt to set forth the facts for such purpose. This instruction is merely for the purpose of stating the law relative to the facts necessary to be proven in regard to establishing the fact that Dell Bailey was driving the truck at the time of the accident in question as agent and servant of the defendant, Theodore O. Miles. We think that this instruction is a fair statement of the law relative to this case.

Complaint is also made that instruction No. 3 given in behalf of the plaintiff is totally defective and therefore should not have been given. The abstract and record discloses that the defendant

filed a motion for a new trial setting forth specifically his reasons for the same. The motion does not make any reference to plaintiff's instruction No. 8. The appellee insists that section 192, Chapter 110, Smith-Hurd Annotated Statutes, provides that motions for new trials shall be filed in writing particularly specifying the grounds of such motion, etc.; that defendant in his motion for a new trial did not specify as one of the objections that plaintiff's instruction No. 8 was erroneous; therefore, the defendant cannot raise that question for the first time in this court. That portion of Section 192 of the Practice Act relating to a new trial, is the same as Section 77 of the old Practice Act. The last expression of our Supreme Court relative to such cases is found in People v. Cohen, 352 Ill., 380. On page 381 we find this language: "Section 77 of the Practice Act directs the party moving for a new trial to file the points in writing, particularly specifying the grounds of his motion. This court has held that that section is directory and not mandatory, and that if the party moving for a new trial makes either a written or verbal motion for a new trial without stating in writing the grounds therefor and without objection, the requirement of such statement is waived. If certain points in writing particularly specifying the grounds of a motion for a new trial have been filed, the party filing the same will be deemed to have waived all causes for a new trial not set forth in his written grounds and in the Appellate Court will be confined to the reasons specified. If the motion has been submitted without specifying the grounds therefor in writing, the party may avail himself of any cause for a new trial which may appear in the record, whether it be the admission or rejection of evidence, the giving or refusing of instructions, the lack of sufficient evidence, or any other error occurring on the trial. The above holding by this court is applicable to both civil and criminal cases." It is our conclusion that the appellant is not in a position to raise the question of the sufficiency of the instruction in question.

filed a motion for a new trial setting forth specifically the reasons for the same. The motion does not make any reference to plaintiff's instruction No. 8. The appellee insists that section 102, chapter 110, Smith-Hurd Annotated Statutes, provides that motions for new trials shall be filed in writing particularly specifying the grounds of such motion, etc.; that defendant in his motion for a new trial did not specify as one of the objections that plaintiff's instruction No. 8 was erroneous; therefore, the defendant cannot raise this question for the first time in this court. This portion of section 192 of the Practice Act relating to a new trial, is the same as section 77 of the old Practice Act. The last expression of our Supreme Court relative to such cases is found in Pappas v. Cohen, 352 Ill., 380. On page 381 we find this language: "Section 77 of the Practice Act directs the party moving for a new trial to file the points in writing, particularly specifying the grounds of his motion. This court has held that that section is directory and not mandatory, and that if the party moving for a new trial makes either a written or verbal motion for a new trial without stating in writing the grounds thereof and without objection, the requirement of such statement is waived. If certain points in writing particularly specifying the grounds of a motion for a new trial have been filed, the party filing the same will be deemed to have waived all grounds for a new trial not set forth in his written grounds and in the Appellate Court will be confined to the reasons specified. If the motion has been submitted without specifying the grounds therefor in writing, the party may avail himself of any cause for a new trial which may appear in the record, whether it be the admission or rejection of evidence, the giving or refusing of instructions, the lack of sufficient evidence, or any other error occurring on the trial. The above holding by this court is applicable to both civil and criminal cases." It is our conclusion that the appellant is not in a position to raise the question of the sufficiency of the instruction in question.

It is also insisted that the court erred in refusing to give certain instructions tendered by the defendant. We have read the instructions given both for the plaintiff and for the defendant, and also the refused instructions, and it is our conclusion that the court did not err in refusing the defendant's proferred instructions as they were covered by other instructions in the case. On the whole the jury was fairly instructed.

The appellant most strenuously insists that the evidence does not sustain the charge that at the time of the accident in question, Dell Shafman was the agent or servant of Theodore O. Miles. Mr. Miles in his testimony states that he was the owner of the truck in question and that Mr. Shafman had been in his employ for quite a number of years; that he furnished the truck and oil and repairs, and that Shafman would drive the truck; that they divided the profits between them, but denies that he had anything to do with the contract under which Shafman was hauling corn. Quite a number of witnesses were called relative to what was said to Shafman about hauling the corn. The custom of Dell Shafman and his dealings with Miles and the other truck drivers was described by the witnesses. This evidence was presented to the jury to decide whether at the time in question Shafman was the agent or servant of the defendant, Theodore Miles. The issue was one for the jury to decide. Shannahan v. Nightingale, 321 Ill., 168; Franklin Coal Company v. Industrial Commission, 296 Ill., 329. A statement of the testimony of the different witnesses testifying relative to this issue would serve no useful purpose. The jury was properly instructed as to the law in such cases. They found the issue in favor of the plaintiff. We cannot say their fihding is against the manifest weight of the evidence.

We find no reversible error in the case and the judgment of the Circuit Court of Knox County is hereby affirmed.

Judgment affirmed.

It is also insisted that the court erred in refusing to give certain instructions tendered by the defendant. We have read the instructions given both for the plaintiff and for the defendant, and also the refused instructions, and it is our conclusion that the court did not err in refusing the defendant's proferred instructions as they were covered by other instructions in the case. In the whole the jury was fairly instructed.

The appellant most strenuously insists that the evidence does not sustain the charge that at the time of the accident in question, Dell Shafman was the agent or servant of Theodore C. Miles. Mr. Miles in his testimony states that he was the owner of the truck in question and that it, Shafman had been in his employ for quite a number of years; that he furnished the truck and oil and repairs, and that Shafman would drive the truck; that they divided the profits between them, but denies that he had anything to do with the contract under which Shafman was hauling corn. Quite a number of witnesses were called relative to what was said to Shafman about hauling the corn. The custom of Dell Shafman and his dealings with Miles and the owner truck drivers was described by the witnesses. This evidence was presented to the jury to decide whether at the time in question Shafman was the agent or servant of the defendant, Theodore Miles. The issue was one for the jury to decide. Sexsmith v. Highlands, 321 Ill., 163; Franklin Coal Company v. Industrial Commission, 290 Ill., 329. A statement of the testimony of the different witnesses testifying relative to this issue would serve no useful purpose. The jury was properly instructed as to the law in such cases. They found the issue in favor of the plaintiff. In counsel for their filing is against the manifest weight of the evidence.

We find no reversible error in the case and the judgment of the Circuit Court of Iroquois County is hereby affirmed.

Judgment affirmed.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32)

PUBLISHED IN ABSTRACT

Bruno Hefer and Bruno Hefer, Administrator of the Estate of Emma Catherine Hefer, deceased, Plaintiffs-Appellees, v. Charles M. Thomson, as Trustee of the Chicago and Eastern Illinois Railway Company, a Corporation, Defendant-Appellant.

Appeal from the Circuit Court of Montgomery County.

JANUARY TERM, A. D. 1938.

Gen. No. 9108 **Agenda No. 14**

MR. JUSTICE DAVIS delivered the opinion of the Court.

Bruno Hefer, individually, and as administrator of the estate of Emma Hefer, deceased, commenced a suit in the Circuit Court of Montgomery County against Charles M. Thomson, as Trustee of the Chicago and Eastern Illinois Railway Company, a corporation, said parties hereinafter referred to as plaintiffs and defendant respectively, to recover damages that the plaintiff, Bruno Hefer, and the husband and next of kin of Emma Hefer, deceased, sustained on account of injuries to plaintiff, Bruno Hefer, and the death of Emma Hefer, caused by the alleged negligence of said defendant.

Upon the trial of said cause the jury returned verdicts assessing the damages of the plaintiff, Bruno Hefer, at the sum of $2000.00 and the damages of Bruno Hefer, administrator, at the sum of $4000.00. Defendant moved the court for judgments, notwithstanding the verdicts of the jury in favor of Bruno Hefer, individually, and as administrator of the estate of Emma Hefer, deceased, which motions were denied by the court. The court upon overruling the motions for a new trial and in arrest of judgments, rendered judgments upon the verdicts of the jury. This is an appeal from said judgments of the circuit court of Montgomery County, entered on August 3, 1937.

The complaint consisted of two counts, in the first of which the plaintiff, Bruno Hefer individually, charged that while he was crossing the tracks of the defendant railway company, at a crossing designated in the complaint, the agents and servants of the defendant so negligently, carelessly and improperly

managed the locomotive and cars of defendant that the same ran upon and struck the automobile driven by plaintiff, Bruno Hefer, and that the same was demolished and he was thrown upon the tracks and ground. This count also charges that defendant violated the provisions of the statute, which provided that a bell be rung or a whistle sounded as the train approached a point where the railroad crosses or intersects the public highway above mentioned. It is also charged that the servants of defendant operated the engine on said tracks in approaching said crossing without maintaining or having any headlight thereon in the night time, when it was very dark, and without giving any warning by bell or whistle of the approach of the train until it was too late for him to avoid being struck; that as a result of the collision with the truck owned by the plaintiff, Bruno Hefer, he was injured.

In the second count of the complaint Bruno Hefer, as administrator of the estate of Emma Hefer, deceased, re-alleges certain allegations contained in count one, and further charges that he and Emma Hefer, husband and wife, were riding in an automobile owned and driven by him in a westerly direction along a public highway and upon the tracks of the railway company. The count charges general negligence, failure to ring a bell or sound a whistle, and failure to have a headlight, and charges as a result of the collision Emma Hefer was instantly killed, and that she left surviving her Bruno Hefer, her husband, and Archibald and Lorraince Hefer, as her sole heirs at law.

The answer of defendant denies the allegations of counts one and two of the complaint and states that Bruno Hefer was the husband of Emma Hefer, and that, if she was injured and killed at the time of the collision, her death was caused by the negligence of her husband, and administrator and plaintiff in the suit; that said death was caused by his negligence in driving the truck in which they were riding onto the railroad track without exercising due care and caution for his safety and the safety of Emma Hefer, and that as a result of said negligence Emma Hefer was injured and killed; that plaintiff, Bruno Hefer, her husband and administrator of her estate for the benefit of the next of kin, is barred by his negligence from recovering damages in any sum, and that the next of kin are also precluded by the negligence of Bruno Hefer, as administrator of her estate, from

recovering any damages for his benefit or either of them.

On June 19, 1937, more than one year after the death of Emma Hefer, plaintiff filed an amendment to his complaint, striking out the name of "Thompson" and inserting in lieu thereof "Thomson," and also striking out the word "Macoupin" County and inserting the word "Montgomery" County; and by inserting in counts one and two the statutory provision requiring all railroads to maintain on all engines in freight service a headlight with sufficient candle power to throw a light which will enable the operator to plainly discern an object the size of a man upon the track at a distance of 450 feet from the headlight.

Defendant filed a motion to strike the amendment on the ground that it introduced a new cause of action not alleged or set forth in the original complaint, and was filed after the expiration of one year from the date of the death of Emma Hefer, and that plaintiff, as administrator, was barred from filing said amendment. The court denied the motion, and defendant answered, alleging that the engine and train was a freight train and was used as such by defendant in freight service, and was equipped as required by said statute. The defendant also moved the court for a separate trial and supported such motion by an affidavit of one of the attorneys in the case, which motion was overruled by the court.

It is contended by defendant that the court erred in allowing the plaintiff, Bruno Hefer, to testify as administrator of the estate of Emma Hefer, deceased, in the case wherein he seeks to recover damages for the benefit of the next of kin of said deceased, and also for failing to grant a separate trial on the ground that the defendant would be embarrassed if the causes were tried together.

The court did not err in refusing to grant a separate trial, because the complaint as filed joined as parties the plaintiff, Bruno Hefer, in his individual capacity and also as administrator of the estate of his wife, Emma Hefer, deceased, and to allow said claims to be joined and prosecuted and tried jointly in the same trial would prejudice and embarrass the defendant to the extent that his rights would be unduly prejudiced; that Bruno Hefer, as husband of Emma Hefer, would be interested in any judgment that might be obtained by him as administrator and would receive a portion of the same; that in his in-

dividual suit he would be a competent witness, but in his suit as administrator he would not be competent, and that it would be impracticable and difficult and impossible for the court to so instruct the jury in the consideration of the testimony to be given, and that the jury would consider said testimony in each of said cases, both individually and the suit in which he appeared as administrator of Emma Hefer, deceased. Neither did the court err in permitting Bruno Hefer to testify in his behalf as administrator of the estate of Emma Hefer, deceased.

Under the provisions of our statute in regard to Evidence and Depositions, no person in any civil action, suit or proceeding shall be allowed to testify therein of his own motion or in his own behalf, when any adverse party sues or defends as the trustee or conservator of any idiot, habitual drunkard, lunatic or distracted person, or as executor, administrator, heir, legatee or devisee of any deceased person, or as guardian or trustee of any such heir, legatee or devisee.

In this case the plaintiff sues as administrator of the estate of Emma Hefer, deceased, and was competent to testify in his own behalf. *I. C. R. R. Co.* v. *Reardon,* 157 Ill. 372, 41 N. E. 871; *Barnes* v. *Earle,* 275 Ill. 381, 114 N. E. 168. It is true that plaintiff would be incompetent to testify as to any communication or admission made by his wife to him, or as to any conversation between them during coverture. Ill. Rev .Stat. 1937, chap. 51, sec. 5, Callaghan's Ill. Stat. Ann. 1932-1935, Supplement, chap. 51, par. 5; *Barnes* v. *Earle, supra.*

Plaintiff as administrator of the estate of Emma Hefer, deceased, did not testify as to any communication or admission made by his wife to him, or as to any conversation between them, and was competent under the common law to testify to any facts, the knowledge of which he had obtained from sources other than his wife. *Mahlstedt* v. *Ideal Lighting Co.,* 271 Ill. 154, 110 N. E. 795.

It is also insisted that the court erred in overruling defendant's motion to strike the amendment to the complaint for the reason that it set up a new cause of action as to Bruno Hefer administrator of the estate of Emma Hefer, deceased, and was filed after the expiration of one year from the date of her death.

Sec. 46 of the Civil Practice Act provides, in substance, that no cause of action set up in a pleading shall be barred by, lapse of time under any statute limiting the time within which an action may be

brought, if the time prescribed or limited had not expired when the original pleading was filed, if it shall appear from the original and amended pleadings that the cause of action asserted, grew out of the same transaction or occurrence set up in the original pleading.

Under the provisions of this section, the court properly permitted such amendment to be made to the original complaint.

The action of the trial court is also complained of, in refusing to give to the jury instruction No. 1, offered on behalf of defendant, which reads as follows:

"The court instructs the jury that if they believe from the evidence the injury complained of was the result of a mere accident, and that neither the plaintiffs nor the defendant were to blame therefor, then you should find the defendant not guilty."

The court did not err in refusing to give this instruction. It is the function of the court to state conditions of fact which the evidence fairly tends to prove, and advise the jurors what rule of law shall be applied in reaching a verdict. *Woods* v. *C. B. & Q. R. R. Co.*, 306 Ill. 217-221, 137 N. E. 806. There are no conditions of fact in this record which the evidence fairly tends to prove that the court could state as a basis for the giving of the rule of law announced in this refused instruction. The giving of this instruction would only tend to confuse the jury and distract them from the real issues in the case. Injury was complained of by Bruno Hefer, individually, and also injury to the next of kin of Emma Hefer, deceased, on account of her death, and as the instruction only calls the attention of the jury to an injury they would have been at a loss to know to which injury the instruction referred, had it been given.

Defendant also contends that the evidence shows that the injuries complained of were caused by the negligence of the plaintiff, Bruno Hefer, and not by reason of any negligence of the defendant, and the verdicts and judgments are contrary to the law and the evidence. It is also insisted that defendant, having made a motion for a new trial which was overruled by the trial court and having assigned as error that the verdicts and judgments were contrary to the law and the evidence, the question then is presented to this court as to whether the evidence is sufficient to support the verdicts of the jury. Citing, *Armour* v. *Pennsylvania R. R. Co.*, 353 Ill. 575, 187 N. E. 532.

The railroad crossing at which it was alleged the servants of defendant negligently ran into the truck, in which the plaintiff and his wife were riding, was located about three miles north of the city of Livingston, in Montgomery county. The railroad tracks of the Chicago and Eastern Illinois Railway Company, controlled and operated by defendant, extends in a northeasterly direction from the city of St. Louis, through the cities of Livingston and Hillsboro, to the city of Chicago. The road upon which the plaintiff, Bruno Hefer, was traveling approached the railroad crossing directly from the east and coming up to the right of way at a distance of about 200 feet northeast of the crossing, with a little jog to the left and then to the north just before it got to the right of way. When he turned to his right, to the north as he was going over the railroad tracks, he intersected another road that ran north and south, crossing the railroad at the same point.

There were two tracks, the south one being the eastbound track and the one on the north the westbound. The train that collided with the truck of plaintiff Bruno Hefer was proceeding in a westerly direction toward St. Louis on the westbound track. At the time of the collision there was a train on the eastbound track about four miles west of this crossing proceeding in an easterly direction toward Chicago. The plaintiff, Bruno Hefer, resided at Staunton, Illinois, and ran a store. About six o'clock on August 2, 1935, he and his wife, Emma Hefer, went into the country to buy some chickens, Hefer driving a half-ton truck. They first stopped at William Schoen's farm which was about a mile east of the crossing and then to John Schoen's farm, and other places, and then back to the John Schoen place again, which was his last stop before starting home. He had two coops of chickens and put them on his truck, one lengthwise and the other crosswise, and a large platform scales at the rear end.

A Mr. Winters and his wife were there when he left. Hefer testified he traveled about 20 miles per hour and went straight west to the crossing over a smooth dirt road, a distance of a little over half a mile, over a level prairie country. As he got almost to the crossing he made a little jog to the left, and before he got to the right of way he stopped about five or six feet from the first set of tracks and looked to the right and left and listened, and saw a train coming from the left at a distance of three or more miles,

headed northeast. He did not see or hear any train coming from the other direction. He then started to cross in low gear and the truck was hit one and a half feet from the back end. When he was crossing the lights on the engine went on about twenty-five or thirty feet from the crossing. There was no bell sounded and no whistle blown and no light on the engine. No whistle was blown at any time before the lights flashed on and the truck was immediately struck. He was thrown into the ditch and his wife was instantly killed. The railroad was three feet or more above the surrounding land, in each direction from the crossing. There were no obstructions to his right, and no trees or fences or obstructions of any kind on either side of the right of way of the railroad to the northeast of the crossing.

Wilmer Winter testified that on the evening of August 2, 1935, he was at the residence of John H. Schoen, and Hefer and his wife came there and stayed about twenty minutes and left; about five minutes later he and his wife left and traveled the same road that Hefer did. As he traveled along he heard no whistle or bell ringing. The windows on his car were down and his hearing was good. He was looking towards the track all of the time and traveling towards the crossing, and did not see a train go by with lights burning.

Edna Schoen, who lived three or four hundred feet southeast of the railroad crossing, heard the train and heard it give two little short blows but did not hear a bell on the train ring at any time. She was sitting around the table talking, in a room in her house which was about 200 feet from the crossing. W. B. Schoen testified that he was at his brother's house, which was about three or four hundred feet from the crossing. The first thing he heard was the train. The whistle did not blow continuously for 80 rods before the crossing. There was no bell ringing. He heard a couple of toots very near the crossing, and did not see any light on the train before he went to the crossing and was in a part of the house where he could have seen the lights. Mamie Winter testified that she was at John Schoen's home on August 2, 1935, and Mr. and Mrs. Hefer came there to get some chickens. They left, and she and her husband left in about five minutes after they did, traveling west towards the crossing. She did not hear any whistle blow on the train and did not hear a bell. Her hearing is good.

She saw the rear end of the train moving when they were about forty rods from the crossing. She did not see any headlight on the locomotive, and got to the crossing before the other train from the southwest came by.

Bert Bush testified he was the engineer in charge of the locomotive at the time of the accident; that the engine was equipped with an electric headlight and bell rung by air; he first saw the flash of the light and then the crash with an automobile. It was over the north rail when he first saw it, and the engine was striking it. He sounded the whistle beginning at the whistling post and was still blowing the whistle when the car was struck. He blew two long, then a short and a long whistle; was running between forty and fifty miles per hour, and the bell was ringing and had been ringing since the train left Pana. It was an automatic bell; the headlight on the engine was burning before that time, and it threw a light eight hundred to one thousand feet in front of the engine, by which you could see an object the size of a man standing erect, in clear weather, one thousand feet. The headlight was turned on at sunset; when the train came to a stop the rear end was about five car lengths past the crossing, the truck had almost cleared the track, and the reason I did not see him before was because he was not there. There was another train about three miles west of that crossing. This train passed after our train was stopped. J. E. Tilton testified he was a locomotive engineer, was east of Livingston on August 2, 1935, at the time of the accident, traveling east from St. Louis and he reached the crossing about 8:45; he saw the engine that is said to have struck the automobile; saw the headlight on the engine when about five miles from it; from where he first saw the headlight up to the crossing the track was straight. M. A. Mettler testified he was on a train when the accident occurred, was a fireman and remembered meeting the train that had been in the accident; saw the headlight on that train more than four miles away and observed it until our train got up to it. L. M. Gallagher testified he was on train 566 traveling east, and remembered coming to the place of the accident and was riding on a box ahead of the fireman's seat, watching ahead; when his train was a couple of miles north of Livingston he saw the headlight of the other train, and saw it until they met and passed each other. Walter Johnson testified he was conductor on the train that was in the accident and

was riding in the caboose; heard the train whistle as it approached the crossing. J. C. Burris testified he was a fireman on the engine involved in the accident, heard the train whistle before it came to the crossing; it whistled about twelve or fifteen hundred feet back; he heard four blasts of the whistle; the engine had a bell on it and it was ringing and had been all of the way down from Hillsboro to the crossing; the engine had a headlight on it that had been burning since sunset.

John DeVries testified he was a farmer who lived not quite half a mile west of the crossing, was setting in his house at the east window which was open; he saw the train about a quarter of a mile northeast of the crossing, coming down the track; it was dark, and the only thing he could see was the headlight; heard the train and heard it whistle one long and two shorts, but did not hear a bell ringing. G. W. Hunt testified he was an extra brakeman on the train involved in the accident and was on the engine when it came to the crossing, and was sitting in the fireman's seat; the engine had a headlight, bell and whistle; when the train was approximately one hundred feet east of the crossing this truck shot right up over the track in front of us and was struck; the right side of the engine struck the truck; the engineer blew the whistle at that time, and had started to blow it eleven or twelve hundred feet back; the bell was ringing and had been ringing continuously from Hillsboro, and the headlight was burning and had been burning continuously from Hillsboro at least.

After having carefully considered the evidence as disclosed by the record in this case and keeping in mind the fact that the court and jury saw the witnesses and heard them testify and were in a better position to judge of the credibility of such witnesses and the weight to be given their testimony than the reviewing court, we are of opinion that the verdict of the jury is contrary to the manifest weight of the evidence.

Unless the testimony of the witnesses sworn on behalf of the defendant is disregarded, we can come to no different conclusion. When the plaintiff, Bruno Hefer, left the Schoen place for home it was dark and he had the headlights on his car lighted, and it is unreasonable to believe that the train crew in charge of the engine and train that struck the truck of the plaintiff Bruno Hefer would, under such condition of darkness, run this train at the rate of forty-five or

fifty miles per hour, with no headlights lit and without giving any warning of the approach of the train, either by bell or whistle, and that they did not is borne out by the testimony of the trainmen of both the train, involved in the accident, and the approaching train from the west.

The judgment of the Circuit Court of Montgomery county is reversed and the cause remanded for a new trial.

Reversed and Remanded.

(Eleven pages in original opinion.)

(52836—4-38) 14

PUBLISHED IN ABSTRACT

George W. Solomon, Plaintiff Appellee, v. The Franklin Life Insurance Company of Springfield, Illinois, An Illinois Corporation, Defendant-Appellant.

Appeal from Circuit Court, Sangamon County.

JANUARY TERM, A. D. 1938.

296 I.A. 651

Gen. No. 9101 **Agenda No. 12**

MR. JUSTICE RIESS delivered the opinion of the Court.

Plaintiff Appellee George W. Solomon recovered a judgment in the Circuit Court of Sangamon County against the Franklin Life Insurance Company of Springfield, Illinois, an Illinois Corporation, Defendant Appellant herein, in the sum of $25,000 upon two life insurance policies issued by said Company in the respective amounts of $15,000 and $10,000, wherein the assured Edward C. Solomon had named said Plaintiff Appellee as beneficiary. The case was tried before a jury, and a verdict was returned in favor of Plaintiff for the full face value of both policies. A motion to set aside the verdict and grant a new trial was denied and judgment was entered on the verdict, from which judgment the Defendant has appealed herein.

The two policies in question were applied for on November 15, 1919, and subsequently issued by the Defendant Company wherein the annual policy year or premium paying period was fixed as of May 25, 1920, and annually in advance on said date thereafter. The annual renewal premium so payable in advance on Policy No. 134329 in the sum of $15,000 was $341.85 and on Policy No. 134330 for $10,000 was $227.90, with privilege to the assured to make all premium payments in quarterly or semi-annual installments and allowing thirty days of grace in making any such payments after the same became due. The premiums were paid on both policies for 16¼ years beginning on May 25, 1920, and so continuing to and including the first quarter of the year 1936, being the period of May 25 to August 25 of the latter year. The assured, Edward C. Solomon, departed this life on October 15, 1936.

The original beneficiary named in the policies was Lilla M. Solomon, the wife of assured, and a change

of beneficiary was subsequently made whereby Plaintiff Appellee George W. Solomon, a brother of the assured, became the beneficiary under the two policies. Provisions were also contained in the policies which gave the assured the privilege of borrowing money from the company to the amount of the net reserve earned or payable thereunder, according to rates and tables set forth in the policies. This privilege provided for the payment of six per cent interest per annum in advance by the assured to the company from the date of the loan to the end of the policy year, being May 25, and annually thereafter to the date when such annual premium so fell due, and to secure the payment of said loan the company was to have a lien upon the policy for all amounts due, and the policy was to be left with the company as such security or to have the amounts of the loans stamped thereon.

On or about October 20, 1932, the assured applied for a loan of $2600 on Policy No. 134329 and of $1700 on Policy No. 134330, which loans were granted and were twice extended and increased under the terms of the respective policies and loan agreements, and the policies were duly stamped with endorsements showing such loans and returned to and held by the assured. Interest was deducted in advance from the face amount of said loans, and checks for the net balance were delivered to the assured.

On June 24, 1935, the loans were again renewed and increased in new loan agreements so as to include certain current and prior premiums payable to the company thereunder, together with interest in advance on the amount of the indebtedness to May 25, 1936. Quarterly premiums were later paid to August 25, 1936, but no payment was made by the assured of the quarterly premiums or on the indebtedness to the company on August 25, 1936, nor was such premium paid within the thirty days of grace provided for in the policies and the same lapsed on said date for failure to pay the quarterly premiums then due.

Certain options of settlement based on the reserve value thereof were provided for in the policies, and it was further therein provided that in case the assured did not elect to take any of said options on the lapsed policies, the policies would become automatically converted into single premium term insurance policies for the face amount of the policies for the number of days, months and years that the net reserve would purchase, to become payable to the beneficiary upon the death of

the assured, at the rate chargeable for his attained age, which was then 51 years. It was further so provided that any loans or moneys remaining due and unpaid from the assured to the company were to be first deducted from the amount of the non-forfeitable reserve values of said policies and that the remainder of net reserve was to automatically provide such term insurance for such time as the same would so extend such policies, according to the terms thereof and of the mortality tables.

It is contended by the Defendant Company, Appellants herein, that after deducting the amount of each loan and interest from the net reserve at the rate per diem so provided for, the amount of such remaining net reserve was only sufficient to carry said insurance policies in effect to the date of September 28, 1936, and that the same were no longer in effect, but had lapsed prior to the date of the death of assured on October 15, 1936. Plaintiff Appellee contended that the net value of such reserve would extend such automatic term insurance policies from August 25, 1936, to or about October 30, 1936, and that at the time of assured's death, the same were still in full force and effect and that the beneficiary was entitled to recover the full face value of said policies.

There appears to be no controversy as to the computations or calculations of the actuaries that the reserve value of the policy contracts at the end of 16¼ years, when they became lapsed for nonpayment of premium on August 25, 1936, was $3,568.20 on Policy No. 134329 and $2,378.80 on Policy No. 134330. The controversy arises over the amount of charges and credits of principal and interest properly deductible from such admitted reserve values in order to ascertain the amount of net reserve remaining thereafter to purchase the extended automatic term insurance.

In Defendant's Exhibits 4 and 5, being the last application of the assured for increase and renewal of loans on the two policies, loan agreements therefor and assignment of policies, dated June 24, 1935, the following clause appears: "First—That interest shall be paid to said Company in advance at the beginning of each policy year, at the rate of Six per cent per annum on the amount of said loan, and that said interest, if not paid when due, shall be added to the principal and bear interest at the same rate and under the same conditions." In this extended loan agreement there was included the amount of all loans, interest and premi-

ums claimed to be due by the company to the date of May 25, 1935, which included compound interest on all previous unpaid interest and included in advance interest for that year plus compound interest thereon for said year, and so aggregating $3495.00 on Policy No. 134329 and $2469.80 on Policy No. 134330 on May 25, 1936.

A new loan of $3495.00 was made on June 24, 1935, including the amount so due on Policy No. 343329, and to this amount was added $52.42, being three months interest from May 25, 1936, to August 25, 1936, or a total of $3547.42 so due on said policy, and to the policy loan of $2330 due on Policy No. 343330 was added $34.95, being three months interest thereon from May 25, 1936, to August 25, 1936, or a total of $2364.95 so due on August 25, 1936, and thus leaving remainders for the purchase of single premium extended insurance in the sum of $20.68 on Policy No. 134329 and $13.85 on Policy No. 134330.

It is conceded by both parties that the rate per day payable for the single premium extended policies would be $.5773 on Policy No. 134329 and $.3849 on Policy No. 134330, but Plaintiff contends that Defendant should have computed interest from June 24, 1935, when the loan was last extended and not from May 25, 1935. However, the end of the policy year when premium and interest fell due as provided for in the policies was May 25, and the extension of the loan to cover said amount was extended within the period of thirty days grace, and there is nothing in the policies, loan agreements or evidence on which to base this claim by Plaintiff.

While courts will construe ambiguous provisions of an insurance policy favorably to the insured, clear provisions upon which the company's calculations are based should be maintained unimpaired by loose interpretations. *Coons* v. *Home Life Ins. Co. of N. Y.* 368 Ill. 231, 13 N. E. 2d S. 482.

All interest on policy loans was payable in advance under the terms of the policies and the loan agreements and compound interest became payable under the terms of the loan agreements on all interest in arrears. The exact amount arrived at by the Defendants actuaries in computing the same was the only evidence offered, and was so computed on a compound interest basis to be the amount hereinabove stated, which at the conceded rate per diem, would extend the policies to September 28, 1936, on which date they would expire

and would be no longer in effect on October 15, 1936, when the assured departed this life.

In computing the interest herein, Appellee has not contended that compound interest was not lawfully chargeable on the policy loans from and after the time that the interest became due and payable, but contended only in his pleadings, brief and argument that an error was made in the date from which interest should be computed whereby a double charge of interest was erroneously made and computed for a period of one month. While we have held against the latter contention under the facts in evidence herein, it has been repeatedly held by the Courts of Review of this state that compound interest cannot be lawfully provided for in advance in a written instrument, and although the Courts have recognized certain exceptions to the above rule, its general application "from motives of public policy" has never been departed from. *Bowman* v. *Neely,* 151 Ill. 37, 37 N. E. 840; *Drury* v. *Wolfe,* 134 Ill. 294, 25 N. E. 626; *Bowman* v. *Neely,* 137 Ill. 443, 27 N. E. 758; *Ramer* v. *Reserve Loan Life Ins. Co.* 213 Ill. App. 164.

The exceptions include those cases wherein interest coupons in negotiable form were issued separately and such compound interest became thereby chargeable by commercial usage and may be once compounded, or in cases wherein the charge and collection of compound interest was subsequently agreed upon and ratified by the parties after the interest became due. *Bowman* v. *Neely, supra, Drury* v. *Wolfe, supra.*

A further apparent exception is provided for by statute in the case of insurance policy loans under the provisions of Section 377 of Chapter 73, Illinois Revised Statutes of 1935, as enacted in 1907, wherein it was provided that "In ascertaining indebtedness due on policy loans, the interest if not paid when due shall be added to the principal of such loans and shall bear interest at the rate specified in the note or loan agreement," which provision was contained in the loan agreement but not in the policies involved in this suit. However, the validity of the above statute, which undertakes to extend to insurance companies alone the privilege of contracting for compound interest in advance in their loan contracts, seems not to have been directly passed upon by the Supreme Court of this State, nor has its applicability to facts wherein such provision is contained in the loan agreement only but not in the policy upon the terms of which the agree-

ment is based, been raised in the pleadings or briefs of the parties herein. By the provisions of the Insurance Code of 1937, the above act was repealed and in lieu thereof, it is provided in substance by Par. 1 (f) of Section 224, Chapter 73 of Illinois Revised Statutes of 1937 that such provisions concerning interest on policy loans may be included in the policy, but that no condition not provided for in the policy shall be exacted as a prerequisite to any such policy loan.

In the case of *Ramer* v. *Reserve Loan Life Ins. Co., supra,* this Court held that compound interest on policy loans made prior to the taking effect of the above Act of 1907 could not be charged, but that simple interest only could be so computed under such prior contracts.

It is not contended by the parties herein that the inclusion of compound interest in the provisions of the last extension of the policy loan has been since ratified by the assured, nor does it appear that said provision is made in a separate negotiable interest coupon. If, therefore, such compound interest is lawfully chargeable, it is only by virtue of the statutory provision hereinabove referred to, the validity of which is not in issue in this case.

If simple interest only were computed since the date of the last policy loan agreement, which ratified the computation of compound interest under previous policy loan agreements, the policies would have continued in effect beyond the date of death of the assured on October 15, 1936.

However, under the issues of law and fact as now presented to this Court, in the pleadings and record herein, we are constrained to hold that the Trial Court committed error in denying the Defendant's motion to set aside the verdict and grant a new trial herein.

Further error is assigned by the Appellant in the giving of an instruction to the jury whereby the remaining net cash value of such reserves were referred to as the "equities" in the policies. This vague and unexplained term should not have been used in the instruction and the same should not have been so given to the jury.

Under the pleadings and the evidence herein, we hold that reversible error appears in the record, and the cause will therefore be reversed and remanded to the Circuit Court of Sangamon County for retrial.

Reversed and Remanded.

(Seven pages in original opinion.)

ment is based, been raised in the pleadings or briefs of the parties herein. By the provisions of the Insurance Code of 1937, the above act was repealed and in lieu thereof, it is provided in substance by Par.1 (f) of Section 224, Chapter 73 of Illinois Revised Statutes of 1937 that such provisions concerning interest on policy loans may be included in the policy, but that no condition not provided for in the policy shall be exacted as a prerequisite to any such policy loan.

In the case of Ramer v. Reserve Loan Life Ins. Co., supra, this Court held that compound interest on policy loans made prior to the taking effect of the above Act of 1907 could not be charged, but that simple interest only could be so computed under such prior contracts.

It is not contended by the parties herein that the inclusion of compound interest in the provisions of the last extension of the policy loan has been since ratified by the assured, nor does it appear that said provision is made in a separate negotiable interest coupon. If, therefore, such compound interest is lawfully chargeable, it is only by virtue of the statutory provision hereinabove referred to, the validity of which is not in issue in this case.

If simple interest only were computed since the date of the last policy loan agreement, which ratified the computation of compound interest under previous policy loan agreements, the policies would have continued in effect beyond the date of death of the assured on October 15,1936.

However, under the issues of law and fact as now presented to this Court, in the pleadings and record herein, we are constrained to hold that the Trial Court

ment is based, been raised in the pleadings or briefs of the parties herein. By the provisions of the Insurance Code of 1937, the above act was repealed and in lieu thereof, it is provided in substance by Par.1 (f) of Section 224, Chapter 73 of Illinois Revised Statutes of 1937 that such provisions concerning interest on policy loans may be included in the policy, but that no condition not provided for in the policy shall be exacted as a prerequisite to any such policy loan.

In the case of Ramer v. Reserve Loan Life Ins. Co., supra, this Court held that compound interest on policy loans made prior to the taking effect of the above Act of 1907 could not be charged, but that simple interest only could be so computed under such prior contracts.

It is not contended by the parties herein that the inclusion of compound interest in the provisions of the last extension of the policy loan has been since ratified by the assured, nor does it appear that said provision is made in a separate negotiable interest coupon. If, therefore, such compound interest is lawfully chargeable, it is only by virtue of the statutory provision hereinabove referred to, the validity of which is not in issue in this case.

If simple interest only were computed since the date of the last policy loan agreement, which ratified the computation of compound interest under previous policy loan agreements, the policies would have continued in effect beyond the date of death of the assured on October 15,1936.

However, under the issues of law and fact as now presented to this Court, in the pleadings and record herein, we are constrained to hold that the Trial Court

ment is based, been raised in the pleadings or briefs of the parties herein. By the provisions of the Insurance Code of 1937, the above act was repealed and in lieu thereof, it is provided in substance by par.1 (f) of Section 224, Chapter 73 of Illinois Revised Statutes of 1937 that such provisions concerning interest on policy loans may be included in the policy, but that no condition not provided for in the policy shall be exacted as a prerequisite to any such policy loan.

In the case of Ramer v. Reserve Loan Life Ins. Co., supra, this Court held that compound interest on policy loans made prior to the taking effect of the above Act of 1907 could not be charged, but that simple interest only could be so computed under such prior contracts.

It is not contended by the parties herein that the inclusion of compound interest in the provisions of the last extension of the policy loan has been since ratified by the assured, nor does it appear that said provision is made in a separate negotiable interest coupon. If, therefore, such compound interest is lawfully chargeable, it is only by virtue of the statutory provision hereinabove referred to, the validity of which is not in issue in this case.

If simple interest only were computed since the date of the last policy loan agreement, which ratified the computation of compound interest under previous policy loan agreements, the policies would have continued in effect beyond the date of death of the assured on October 15,1938.

However, under the issues of law and fact as now presented to this Court, in the pleadings and record herein, we are constrained to hold that the Trial Court

properly denied the Defendant's motions for a directed verdict and for judgment non obstante veredicto, but committed error in denying the Defendant's motion to set aside the verdict and grant a new trial herein.

Further error is assigned by the Appellant in the giving of an instruction to the jury whereby the remaining net cash value of such reserves were referred to as the "equities" in the policies. This vague and unexplained term should not have been used in the instruction and the same should not have been so given to the jury.

Under the pleadings and the evidence herein, we hold that reversible error appears in the record, and the cause will therefore be reversed and remanded to the Circuit Court of Sangamon County for retrial.

REVERSED AND REMANDED.

(Seven pages in original opinion)

properly denied the Defendant's motions for a directed verdict and for judgment non obstante veredicto, but committed error in denying the Defendant's motion to set aside the verdict and grant a new trial herein.

Further error is assigned by the Appellant in the giving of an instruction to the jury whereby the remaining net cash value of such reserves were referred to as the "equities" in the policies. This vague and unexplained term should not have been used in the instruction and the same should not have been so given to the jury.

Under the pleadings and the evidence herein, we hold that reversible error appears in the record, and the cause will therefore be reversed and remanded to the Circuit Court of Sangamon County, for retrial.

REVERSED AND REMANDED.

(Seven pages in original opinion)

IN THE

APPELLATE COURT OF ILLINOIS

Fourth District

Term

Feb. Term A.D. 1938

Agenda #7

THE PEOPLE OF THE STATE OF ILLINOIS, For the Use of GEORGE COSTOPOLUS, Plaintiff-Appellee,	Appeal from Circuit Court of Madison County.
vs.	-----
L. A. MAXWELL, Defendant,	Honorable R. W. Griffith,
CLARA E. MAXWELL, T. S. HENDRICKS and AUGUST DIETIKER, Defendants-Appellants.	Trial Judge.
	296 I.A. 651

STONE, J.

This is an appeal from a judgment of the Circuit Court of Madison County, Illinois, in favor of the appellee and against appellants in a suit upon a constable's bond executed by appellants. The Circuit Court directed the jury to find the issues in favor of the plaintiff, appellee, and to assess the damages. The jury returned a verdict in favor of the plaintiff for the sum of $1142.41 and judgment was entered thereon.

Certain Nieft brothers had obtained a judgment before a justice of the peace against one Coste. In serving execution on the judgment, L. A. Maxwell, the constable, levied on goods in the possession of Coste, but claimed by appellee, George Costopolus, as his property. Proceedings for trial of the right of property were had on June 16, 1933, before the Justice of the Peace who found against the appellee Costopolus and in favor of the execution plaintiffs. An appeal was taken from this judgment to the Circuit Court of Madison County. On June 21, 1933, the appeal bond was filed in the office of the Circuit Clerk and approved. The record is devoid of evidence as to whether an appeal was prayed the day judgment in the trial of the right of property was entered by the justice of the peace.

On June 29, 1933, a supersedeas issued and was mailed to the justice of the peace. On March 22, 1934, the trial of the right of property was called in the Circuit Court. The execution plaintiffs moved to quash the supersedeas and the motion was denied. The execution plaintiffs moved for a continuance. The motion was denied. A jury trial was had resulting in a judgment awarding the appellee, Costopolus, possession of the property seized by the constable.

The constable had on June 17, 1933, conducted an execution sale of the property.

The complaint in the suit below set forth the foregoing proceedings. The averment with respect to the appeal, after the averment of the judgment in the justice court on the trial of the right of property, was: "That the said George Costopolus thereupon removed said cause to the Circuit Court of Madison County, Illinois, by filing a Bond in the Office of the Clerk of the Circuit Court of Madison County, Illinois." The answer denies every averment of the complaint.

There is a notation on the docket of the Justice of the Peace as follows: "July 3:- Case appealed by plaintiff and is sent to Edwardsville Madison Co. Circuit Court." This notation is not in the transcript of the justice which was filed July 3, 1933, in the office of the Clerk of the Circuit Court.

Appellants contend that since the record fails to show that an appeal was prayed for from the justice of the peace in the time prescribed by statute the Circuit Court could have entered no order except to dismiss the appeal. Appellees contend on collateral attack there is a presumption of jurisdiction and that the motion for continuance constituted a general appearance and waived any possible defect in the appeal. They further assert that the judgment of the Circuit Court in the trial of the right of property clearly established the right of action against the constable.

In the case of PEOPLE v. CROWE, 130 Ill. App. 349, a suit against a sheriff and his bondsmen for a wrongful levy the court said, of a judgment previously entered in favor of the plaintiff in a trial of the right of property.

"By such a judgment a right of action against the sheriff was clearly established, and the only question remaining to be determined was the amount of damages, if any, sustained by appellant by reason of the unlawful seizure and retention of the property." The same conclusion was reached in PEOPLE v. EGAN, 239 Ill. App. 61, ILG v. BURBANK, 59 Ill. App. 291, andPEOPLE v. WARD, 41 Ill. App. 464.

It follows therefore that if the Circuit Court of Madison County had jurisdiction of the appeal in the trial of the right of property a suit would lie in the present case against the Sheriff and his bondsmen. The only question with respect to jurisdiction is whether the appeal was prayed the day judgment was entered by the justice of the peace. We have said that the record is devoid of evidence on this point. No particular form of prayer for appeal is prescribed by law in such cases. The desire or intention to appeal made known to the justice is sufficient . HUGHES v. GLOVER, 53 Ill. App. 141, SKIMUTIS v. AMERICAN CITIZENS LITHUANIAN CLUB, 202 Ill. App. 557 on 561. The Circuit Court did take jurisdiction. The present attack is a collateral attack on that judgment. Where a court of general jurisdiction renders a decree that fact raises a presumption as against a collateral attack that it had jurisdiction both as to subject matter and parties. HORN v. METZGER, 234 Ill. 240. JEFFRIES v. ALEXANDER, 266 Ill. 49. In the Horn case the record failed to show and the decree failed to recite service of summons on the parties. In the Jeffries case there was a decree of divorce which failed to recite that the plaintiff was a resident of Illinois.

It appears further that the Circuit Court had jurisdiction because the execution plaintiffs moved for a continuance without limiting their appearance; and in other respects entered a general appearance in the case. SCHNELL v. NORTH SIDE PLANING

MILL CO., 89 Ill. 581, DAVISON v. HEMRICH, 340 Ill. 349.

Appellants having failed to make any affirmative showing of the failure of the appellee George Costopolus to pray for an appeal the day judgment was entered, and the Circuit Court having assumed jurisdiction of the cause we hold that the judgment of the Circuit Court of Madison County in the trial of the right of property was conclusive of the right of action in the present suit. The judgment of the Circuit Court of Madison County is affirmed.

Not to be published in full

Sent to the publisher in 1900

STATE OF ILLINOIS,
APPELLATE COURT,
FOURTH DISTRICT.

Agenda 6.

February Term, 1938.

Otillie Blum, et al.,
Appellees,
vs.
Clara Buesking, et al.
Appellants.

Appeal from Circuit Court of
Madison County.

296 I.A. 651

EDWARDS, J.

This is a suit to set aside a will executed by Johanna Aumann, deceased, executed on April 24, 1933, and who died on February 3, 1936. The grounds averred in the complaint are that testatrix lacked the necessary testamentary capacity and was under undue influence in the execution of the will. The cause was submitted to the Court without the intervention of a jury, who, after hearing, found the issue of undue influence was not sustained by the evidence, but that Mrs. Aumann was proven to have lacked the necessary mental capacity to make a will, and decree was entered setting same aside; to reverse which this appeal has been perfected.

The testatrix, at the time the instrument was executed, was a widow about 78 years of age, having several children and grandchildren who were her lawful heirs. Her estate consisted of personalty of the value of between $4,000 and $5,000. By her will she gave her daughter Clara Buesking, with whom she had been residing, $2,000, and the residue was equally divided among her heirs including Mrs. Buesking.

Mrs. Aumann was taken by the husband of Mrs. Buesking to the office of an attorney, who drew the will for her, though it does not appear that her

son-in-law was present during the consultation with the attorney or at the time the document was executed by her. In July, 1935, a conservator was appointed for her by the Probate Court of Madison County because of her mental incompetency.

Upon the hearing the testimony bearing upon the mental condition of Mrs. Aumann was sharply conflicting. Ten witnesses for the plaintiffs deposed that she was not of sound mind, while seventeen called for defendants stated that in their opinion she had sufficient mental capacity to execute a last will. All of these witnesses detailed facts and circumstances over a period of time, both before and after the drafting and signing of the instrument in question, upon which they based their opinions. Some were neighbors of long acquaintance; one, the pastor of her church who administered to her spiritual needs; also the County Judge and Probate Judge of Madison County; the attorney who drew the will, and the physician who at times attended her.

We are asked to reverse the decree for the sole reason that the finding of mental incapacity to make a will on the part of Mrs. Aumann was contrary to the weight of the evidence.

The finding of the chancellor in a cause submitted to him for hearing and decision has the same force as the verdict of a jury, and is not to be disturbed by a reviewing court unless manifestly against the weight of the evidence. Here the trial judge who saw and heard the witnesses, with opportunity to observe their demeanor and apply the usual tests of credibility, had a decided advantage over this court in determining the weight to be given their testimony and arriving at a conclusion as to the ultimate facts.

Upon this record we do not feel that we can say that the finding is opposed to the manifest weight of the evidence, or that we would be warranted in reversing same. The decree is affirmed.

D.K. Not to be published in full

Decree affirmed.

37367

72A

HERITAGE COAL CO., a corporation,
Appellee,

v.

AUGUSTA DREVES,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

296 I.A. 652

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In the clerk's transcript of the record of the above entitled cause there is no bill of exceptions, but from the transcript the following is disclosed:

On July 28, 1933, plaintiff caused a judgment by confession for $410, including $60 attorney's fees, to be entered against defendant on her judgment note for $600, dated January 26, 1932, payable to plaintiff's order "in consecutive monthly installments of $25 each on the 1st day of each month beginning in March, 1932, and continuing thereafter for 24 months, together with legal interest." On the face of the note also is the provision that "if any installment of this note is not paid, *** the entire amount unpaid shall be due and payable forthwith at the election of the holder of this note without notice." And there is also the usual clause authorizing a confession of a judgment "at any time hereafter" for such amount as shall appear to be unpaid or declared due, "together with costs and 20 per cent of the balance due or declared due as attorney's fees." Apparently it is admitted that ten of the installments of $25 had been paid, and also accrued interest, because the amount claimed to be due on the note is stated in plaintiff's affidavit of claim to be $350, together with costs and attorney's fees.

37567

HERITAGE COAL CO., a corporation,
Appellee,

v.

AUGUSTA DEVERS,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

296 I.A. 652

MR. MUNICIPAL JUSTICE DALEY DELIVERED THE OPINION OF THE COURT.

In the clerk's transcript of the record of the above entitled cause there is no bill of exceptions, but from the transcript the following is disclosed:

On July 28, 1933, plaintiff caused a judgment by confession for $410, including $50 attorney's fees, to be entered against defendant on her judgment note for $500, dated January 26, 1932, payable to plaintiff's order "in consecutive monthly installments of $25 each on the 1st day of each month beginning in March, 1932, and continuing thereafter for 24 months, together with legal interest." On the face of the note also is the provision that "if any installment of this note is not paid, *** the entire amount unpaid shall be due and payable forthwith at the election of the holder of this note without notice." And there is also the usual clause authorizing a confession of a judgment "at any time hereafter" for such amount as shall appear to be unpaid or declared due, "together with costs and 20 per cent of the balance due or declared due as attorney's fees." Apparently it is admitted that ten of the installments of $25 had been paid, and also accrued interest, thereby the amount claimed to be due on the note is stated in plaintiff's affidavit of claim to be $410, together with costs and attorney's fees.

On September 5, 1933, more than 30 days after the entry of the judgment, defendant, by a firm of attorneys, filed a written motion to vacate it. The motion was supported by her affidavit, sworn to on August 31st, in which she stated in substance (a) that she had executed the note; (b) that it was given "in payment of a 'Heritage Stoker' which she purchased of plaintiff under a written contract;" (c) that the agreement provided that plaintiff "guaranteed the satisfactory operation of the stoker" and that it "would service the stoker for a period of one year from date of purchase, free of charge;" (d) that it was not in good working order "on many occasions" and defendant notified plaintiff of that fact, but it failed to service and repair the stoker in disregard of the agreement; (e) that the stoker sold to defendant was represented to be a new one, whereas it was a second hand one; (f) that owing to plaintiff's failure to keep the stoker in repair, defendant was unable to keep the apartments of her building sufficiently heated and she sustained a monetary loss "due to the departure of dissatisfied tenants;" and (g) that "there has been a failure of consideration for the note confessed," and that she has a "good and meritorious defense to the whole of plaintiff's claim." On the same day the court ordered that the motion be entered but that the hearing thereon be continued to October 3rd, and further ordered that defendant be given leave to file "an amended petition in five (5) days." It does not appear that defendant filed any petition within five days from September 5th.

On October 4th (the day after the day to which the hearing on defendant's motion had been continued) the court entered an order (evidently on plaintiff's motion) that defendant's said motion to vacate the judgment by confession "be stricken for want of prosecution."

On November 21, 1933, more than 30 days after said order of October 4th had been entered, the court entered a further order

On September 3, 1933, more than 30 days after the entry of the judgment, defendant, by a firm of attorneys, filed a written motion to vacate it. The motion was supported by her affidavit, sworn to on August 31st, in which she stated in substance (a) that she had executed the note; (b) that it was given "in payment of a 'Heritage Stoker' which she purchased of plaintiff under a written contract;" (c) that the agreement provided that plaintiff "guaranteed the satisfactory operation of the stoker" and that it "would service the stoker for a period of one year from date of purchase, free of charge;" (d) that it was not in good working order "on many occasions" and defendant notified plaintiff of that fact, but it failed to service and repair the stoker in disregard of the agreement; (e) that the stoker sold to defendant was represented to be a new one, whereas it was a second hand one; (f) that owing to plaintiff's failure to keep the stoker in repair, defendant was unable to keep the apartments of her building sufficiently heated and she sustained a consequent loss "due to the departure of dissatisfied tenants;" and (g) that "there has been a failure of consideration for the note concerned," and that she has a "good and meritorious defense to the whole of plaintiff's claim." On the same day the court ordered that the motion be entered but that the hearing thereon be continued to October 3rd, and further ordered that defendant be given leave to file "an amended petition in five (5) days." It does not appear that defendant filed any petition within five days from September 5th.

On October 4th (the day after the day to which the hearing on defendant's motion had been continued) the court entered an order (evidently on plaintiff's motion) that defendant's said motion to vacate the judgment by confession "be stricken for want of prosecution."

On November 21, 1933, more than 30 days after said order of October 4th had been entered, the court entered a further order

in which, after stating that defendant appeared and again moved the court to vacate said judgment by confession, it is further stated that "the court, being fully advised, overrules said motion." From this order defendant prayed and was allowed an appeal to this court, conditioned upon her filing an appeal bond, with security to be approved by the court, within 30 days. She was also allowed 60 days within which to file a bill of exceptions. And she perfected the present appeal by filing such a bond within the required time, which bond was duly approved by the trial judge. But no bill of exceptions, as to what occurred or what evidence or affidavits were introduced on said hearing on November 21st, is contained in the present record.

There is contained in the clerk's transcript, however, a certain new "petition," signed by defendant, which the clerk certifies was filed in his office on November 21, 1933, - the same day that said last mentioned order was entered. But the present record does not disclose that the court granted defendant leave to file such petition. And in the absence of any bill of exceptions containing the same it is not properly before us for our consideration.

Defendant's counsel here contends that the court erred in entering the order of November 21, 1933, refusing to open the judgment by confession, entered against defendant on July 28, 1933, and to allow her to plead and to have a trial on the merits before a jury. In view of the facts as disclosed from the present record, as well as numerous decisions of the courts of review of this State applicable thereto, we are unable to agree with the contention. In People v. Glasgow, 301 Ill. 394, 395, it is said: "In the absence of a bill of exceptions we are unable to tell for what reason the court entered its judgment dismissing the information. The presumption in favor of the regularity of proceedings in court will obtain until overcome

in which, after stating that defendant appeared and again moved the court to vacate said judgment by confession, it is further stated that "the court, being fully advised, overruled said motion." Upon this order defendant prayed and was allowed an appeal to this court, conditioned upon her filing an appeal bond, with security to be approved by the court, within 30 days. She was also allowed 60 days within which to file a bill of exceptions. And she perfected the present appeal by filing such a bond within the required time, which bond was duly approved by the trial judge. But no bill of exceptions, as to what occurred or what evidence or affidavits were introduced on said hearing on November 21st, is contained in the present record.

There is contained in the clerk's transcript, however, a certain mere "petition," signed by defendant, which the clerk certifies was filed in his office on November 21, 1922, - the same day that said last mentioned order was entered. But the present record does not disclose that the court granted defendant leave to file such petition. And in the absence of any bill of exceptions containing the same it is not properly before us for our consideration.

Defendant's counsel here contends that the court erred in entering the order of November 21, 1922, refusing to open the judgment by confession, entered against defendant on July 22, 1920, and to allow her to plead and to have a trial on the merits before a jury. In view of the facts as disclosed from the present record, as well as numerous decisions of the courts of review of this state applicable thereto, we are unable to agree with the contention. In Peoples v. Glenn, 301 Ill. 394, 398, it is said: "In the absence of a bill of exceptions we are unable to tell for what reason the court overruled its judgment dismissing the information. The presumption in favor of the regularity of proceedings in court will obtain until affirmative

by a showing that error has been committed." In Hartenfeld v. Klein Co., 107 Ill. App. 88, 89, it is said: "The record contains no bill of exceptions. The motions above mentioned and the rulings of the court thereon are not part of the common law record. (Van Gott v. Sprague, 5 Ill. App. 99, 101), and they not being preserved by bill of exceptions, plaintiff in error is not in a position to question the rulings of the court on the motions, and we can not review them." In Sternberger v. Wright, 239 Ill. App. 490, 492, it is said: "A motion to open a judgment by confession and for leave to plead is analogous to a motion to vacate a judgment by default, and the rule as to laches in default cases is applicable. (Citing Keener v. Truax, 195 Ill. App. 285, 288; Freeman v. Counsell, 203 id. 333, 335.) A default will not be set aside although the defendant may show that he has a good defense, when it does not appear that he exercised proper diligence. (Citing Mendell v. Kimball, 85 Ill. 582, 583.) An application to set aside a default must state a meritorious defense, and a reasonable excuse for not having made that defense in due time. (Citing Hitchcock v. Herzer, 90 Ill. 543, 544.)" And we think it clearly appears from the common law record in the present case that the court was amply justified in entering the order of November 21, 1933, in question, on the ground of the lack of diligence of defendant or her attorney or attorneys.

The order appealed from should be and is affirmed.

AFFIRMED.

Scanlan and Sullivan, JJ., concur.

by a showing that error has been committed." In Bertenfeld v. Klein Co., 107 III. App. 80, 89, it is said: "The rescore contains no bill of exceptions. The motions above mentioned and the rulings of the court thereon are not part of the common law record. (Van Goto v. Burgess, 5 III. App. 99, 101), and they not being preserved by bill of exceptions, plaintiff in error is not in a position to question the rulings of the court on the motions, and we can not review them." In Steinberger v. Knight, 229 III. App. 490, 499, it is said: "A motion to open a judgment by confession and for leave to plead is analogous to a motion to vacate a judgment by default, and the rule as to laches in default cases is applicable. (citing Keener v. Trusk, 193 III. App. 193, 198; Freeman v. Cornwell, 203 id. 332, 338.) A default will not be set aside although the defendant may show that he has a good defense, when it does not appear that he exercised proper diligence. (citing Wendell v. Liebell, 89 III. 382, 383.) An application to set aside a default must state a meritorious defense, and a reasonable excuse for not having made that defense in due time. (citing Hitchcock v. Meyer, 90 III. 343, 344.)" And we think it clearly appears from the common law record in the present case that the court was amply justified in entering the order of November 21, 1932, in question, on the ground of the lack of diligence of defendant or her attorney or attorneys.

The order appealed from should be and is affirmed.

AFFIRMED.

Gaynor and Sullivan, JJ., concur.

RESERVE BOOK

Illinois Appellate Opinions

Vol. 296

This reserve book is not transferable and must not be taken from the library, except when properly charged out for overnight use.

Borrower who signs this card is responsible for the book in accordance with the posted regulations.

Avoid fines and preserve the rights of others by obeying these rules.

DATE	NAME	
		2971

RESERVE BOOK

Illinois Appellate Opinions
Vol. 296

This reserve book is not transferable and must not be taken from the library, except when properly charged out for overnight use.

Borrower who signs this card is responsible for the book in accordance with the posted regulations.

Avoid fines and preserve the rights of others by obeying these rules.

DATE	NAME	
	~~Stickland 939 2971~~	
1-24-66	Stiebel	
	236-3763	
	246-9020	
12/9/66	~~Kurtz~~	~~[illegible]~~
2/21/67		WA 3-5771
7/10/67		"
6-5-67	~~Berg Burke~~	782-0552
1-2-68	J. Burke	
9/3	V. Parker	
10-11	~~Kring~~	AN3-640
4/24/73	B. Jackson	646
9/24/73	~~Bernard Pillot~~	CR 6-3455
3/29/74	Peter A. Jung	236-3985
~~5-6-74~~	~~J. Callahan~~	~~Gec 7106~~
5-6-74	J. Callahan	Gec 7106
	Joel Fuller	512-1386

RESERVE BOOK

This reserve book is not transferable and must not be taken from the library, except when properly charged out for overnight use.

Borrower who signs this card is responsible for the book in accordance with the posted regulations.

Avoid fines and preserve the rights of others by obeying these rules.

DATE	NAME	
	~~[illegible]~~	~~[illegible]~~
9/17/65	~~Bonner~~	~~PR 5-1000~~
10/9/73	~~S. Bonner~~	~~329-5680~~
8/9/74	~~[illegible]~~	~~[illegible]~~
3/6/75	McKenna Stein	12-636
12-13	K. Pustka	332-0913
7-24	C. Glenn	346-7800
3/24	W. Stevens	327-4700
12/5	P. Nielsen	782-2618
		332-2000